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CASES

ARGUED AND ADJUDGED

IN

The Supreme Court

OF

THE UNITED STATES,

OCTOBER TERM, 1814.

REPORTED BY

JOHN WILLIAM WALLACE.

VOL. XXIII.

THE BANKS LAW PUBLISHING CO.
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1906

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ALLOTMENT, ETC., OF THE JUDGES

OF THE

SUPREME COURT OF THE UNITED STATES,

AS MADE APRIL 1, 1874, UNDER THE ACTS OF CONGRESS OF JULY 23, 1866, AND MARCH 2, 1867.

NAME OF THE JUDGE, AND STATE WHENCE COMING.	NUMBER AND TERRITORY OF THE CIRCUIT.	DATE AND AUTHOR OF THE JUDGE'S COMMISSION.
CHIEF JUSTICE.	FOURTH.	1874.
HON. M. R. WAITE, Ohio.	MARYLAND, WEST VIRGINIA, VIRGINIA, NORTH CAROLINA, AND SOUTH CAROLINA.	January 21st. PRESIDENT GRANT.
ASSOCIATES.	SECOND.	1872.
HON. WARD HUNT, New York.	NEW YORK, VERMONT, AND CONNECTICUT.	December 11th PRESIDENT GRANT.
	THIRD.	1870.
HON. WM. STRONG, Pennsylvania.	PENNSYLVANIA, NEW JERSEY, AND DELAWARE.	February 18th. PRESIDENT GRANT.
	FIRST.	1858.
HON. N. CLIFFORD, Maine.	MAINE, NEW HAMPSHIRE, MASSACHUSETTS, AND RHODE ISLAND.	January 12th. PRESIDENT BUCHANAN.
	FIFTH.	1870.
HON. J. P. BRADLEY, New Jersey.	GEORGIA, FLORIDA, ALABAMA, MISSISSIPPI, LOUISIANA, AND TEXAS.	March 21st. PRESIDENT GRANT.
	SIXTH.	1862.
HON. N. H. SWAYNE, Ohio.	OHIO, MICHIGAN, KENTUCKY, AND TENNESSEE.	January 24th. PRESIDENT LINCOLN.
	EIGHTH.	1862.
HON. S. F. MILLER, Iowa.	MINNESOTA, IOWA, MISSOURI, KANSAS, ARKANSAS, AND NEBRASKA.	July 16th. PRESIDENT LINCOLN.
	SEVENTH.	1862.
HON. DAVID DAVIS, Illinois.	INDIANA, ILLINOIS, AND WISCONSIN.	December 8th. PRESIDENT LINCOLN.
	NINTH.	1863.
HON. S. J. FIELD, California.	CALIFORNIA, OREGON, AND NEVADA.	March 10th. PRESIDENT LINCOLN.

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DECISIONS

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1874.

The Clarita and The Clara.

1. The owners of a vessel in flames towed by a tug and no longer in command of her own captain and crew, are not liable for injury done by her to another vessel, by the negligence of the captain of the tug; the said owners not having employed the tug, she being a tug whose regular business was the assistance of vessels in distress, and she having gone, of her own motion, to the extinguishment of the fire in this case.
2. A vessel anchored in the Hudson, opposite to the Hoboken wharves, if anchored three hundred and fifty yards from their river front, is anchored so far from shore that in case of a collision with a vessel towed in flames out of the Hoboken docks, no allegation can be made that she is anchored too near the shore.
3. A vessel at anchor having an anchor light and one man on deck, though not strictly an anchor-watch, is guilty of no fault in not being better lighted or watched.
4. A vessel whose business it is to give relief to vessels on fire is bound to have chain hawsers or chain attachments on board, and if having only manilla hawsers she is compelled to tow a vessel out of its dock with such a hawser, which is burnt, so that the vessel on fire gets loose from the tug, and, drifting, sets fire to another vessel, the tug is liable for the damages caused.
5. The owners of a vessel who through their own carelessness (or that of their captain) set fire to another vessel, cannot claim salvage for putting that fire out.

Appeals from the Circuit Court for the Southern District of New York; the case being thus:

A company in New York, called the New York Harbor Protection Company, and whose business was the aiding,

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protecting, and saving vessels in the port of New York, when wrecked or in distress—including the rendering of aid, protection, and safety to such vessels on fire or threatened with conflagration—was the owner of a steam-tug called the Clarita. This tug was equipped, not only with means suited to assist vessels wrecked or in distress, generally, but with special apparatus for extinguishing fires, that is to say with powerful pumps and hose, worked by steam as fire-engines, also with axes and instruments for scuttling. The commander, too, was skilled in the use of such apparatus as well as in the ordinary management of a vessel in seasons of storm and occasions of distress from casualty and weather.

The dock of the vessel was at the foot of Canal Street, New York, where she was kept in constant readiness for service, with a crew on board, with fires "banked," so that at any time she could be set in motion and brought into service.

She was in her dock and in this state on the evening of the 1st of August, 1870, having on board several hempen hawsers strong enough to tow the largest vessels, but not having any hawser of chain, nor a chain attachment for a rope hawser. Hempen hawsers, as was proved, are the sort of hawser universally used in the port of New York for towing vessels heavily laden or disabled, and much preferable, *in such cases*, to chain cable. The only chains which the tug had on board were her anchor-chains, of from fifty to seventy fathoms long, down in the locker; very heavy chains, too heavy, indeed, to be handled in any sudden emergency.

Though constantly called on for assistance in cases of collision, springing of leaks, wreck, and other catastrophes arising from bad navigation weather, or want of seaworthiness, and sometimes to extinguish fires before they had got much headway, the Clarita had never, in five years, been called on to *tow* more than one vessel in a state of conflagration, or one about to become in that state.

With this history, and in this state of things, on the evening aforesaid, and while the tug was in her dock at the foot

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of Canal Street, New York, her captain espied a smoke which indicated a fire, rising apparently out of the water's edge, at Hoboken, on the Jersey shore, opposite. He got steam up on his tug at once, and was shortly at the Christopher Street slip, Hoboken, from which the smoke was ascending. He here found that a ferry-boat of the Hoboken Ferry Company was on fire; the fire, however, being in her hold, and not yet having burst forth anywhere into flame. Numerous people were on or about her, assisting to put out the fire. A Hoboken fire company was doing what it could, and two other steamers in or near the dock were sending water into her from their hose. The tug having made herself fast to the ferry-boat by one of her hempen hawsers got to work and plied her engines vigorously. A gas-tank belonging to the ferry company, which, of course, was particularly liable to ignite and explode, was near by; the dock had numerous vessels in it, and there were houses close to the place which, if a conflagration took place in the dock, would perhaps take fire and be consumed. The tug worked diligently for an hour and more, but the fire being in the hold, which was filled with flame and smoke, and therefore could not be entered so as to direct the water advantageously, gained upon the most active and persistent efforts, and it was soon discovered that it had reached the deck over the hold and was ascending to the joiner-work, of which the cabins and wheel-house, and other light wood-work on deck were composed. The master of the burning ferry-boat, who, with the chief of the Hoboken fire department, was on board of her, now requested the captain of the tug to pull the ferry-boat out of the slip and tow her on to Hoboken Flats, which were the nearest flats, and not far off. The captain of the tug hereupon, and within five minutes, attached the hawser, by which on arriving the tug had been made fast to the ferry-boat, to an iron cleat on the bow of the ferry-boat, and the tug (with the master of the ferry-boat and men of the Hoboken fire department on board), backed out of the ferry-slip and then went ahead.

Although, as already stated, the steam-tug had no chain

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cable (other than unwieldy anchor chain) or chain attachment on board, it appeared by testimony given in the case that there was a light chain cable on a boat in the dock which had been assisting in putting out the fire. After the ferry-boat had been hauled about two hundred yards out of the slip, the flames burst out fore and aft and burned the hawser off, and the ferry-boat was drifted by the tide foul of a bark on the Hoboken side of the river, above the ferry slip, at anchor, before the men on the tug could get hold of her again, and set fire to the bark.

As soon as practicable, another hawser (hempen) was got to the ferry-boat, and she was hauled off from the bark.

With this second hawser the ferry-boat was got round, heading up the river, when this hawser, too, parted, from being burned off by the fire on the ferry-boat. Then, as soon as it could be done, a third hawser (this time a large hawser of seven inches) was taken to the ferry-boat in a life-boat belonging to the ferry-boat and by men from the ferry-boat and the Hoboken fire department, and was again attached to the ferry-boat. But this hawser, too, was burned off. The iron cleat to which these different hawsers had been attached remained standing in the boat.

On this third parting of the hawser which had been attached to the burning ferry-boat, every effort was made to get a line to her again as soon as possible, but before one was got to her she had drifted broadside upon the bows of a schooner, The Clara, at anchor in the river, with a proper anchor-light, but with all her men except one, who happened to be up and walking about, asleep below, and set fire to her fore-rigging, sails, and bowsprit. The place where the schooner lay anchored was about three hundred and fifty yards from the front of the Hoboken wharves. The ferry-boat, which was 164 feet long, came midship on the bows. The tug soon hauled up by the schooner and sent and attached the hawser again, and for a fourth time, to the burning ferry-boat. This time it was not burned off, and the tug, plying all her force, dragged the burning boat from the schooner away into the deep stream, where the hawser was

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cut and the half-consumed remains of the ferry-boat allowed to sink.

As soon as the hawser was cut, the tug returned to the schooner, which was now burning fiercely, and certain, unless aid came to arrest the flames, to be consumed entirely. The tug made fast to her, and after having plied her engines for two hours and more succeeded in extinguishing the flames.

The owner of the schooner, thus saved from entire destruction, now filed a libel against the tug, to recover damages for the injury which she, the schooner, had suffered from the fire.

The owners of the tug in turn filed a libel against the schooner, for salvage, as having saved her from being burnt up entirely.

The case was heard upon the cross-libels.

The owners of the schooner contended that the tug was guilty of negligence, in not having had and used a chain hawser. The owners of the tug alleged that their hawser was good enough, and that the catastrophe was an inevitable accident, and moreover that the schooner was to blame in not having had an anchor-watch, who would have seen the burning vessel drifting on her and would have got out of her way. The District Court was of the opinion—

(1.) That the attempt to tow the burning ferry-boat out into the stream by a *hempen* hawser was an act of negligence.

(2.) That the drifting of the ferry-boat was not an inevitable accident, but was the result of negligence on the part of those in charge of the steam-tug.

(3.) That the schooner, not being required by law to keep a watch under the circumstances, was without fault, and entitled to damages.

That court accordingly gave to the owners of the schooner damages compensatory of the partial destruction which she had suffered by being set on fire by the drifting and burning ferry-boat. And after such a decree dismissed, of course, and from necessity, the libel of the tug for salvage, in preventing her being burned as to her residue.

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Argument for the owners of the tug.

The Circuit Court on appeals confirmed the decrees, and from the decrees of the latter court these appeals were taken by the owners of the tug.

Mr. Van Santvoord, for the appellants:

The questions in the two appeals arise upon the same facts; and the question whether the owners of the tug are entitled to salvage for saving the schooner from being wholly consumed, depends wholly on the question whether the tug wrongfully caused the schooner to be set on fire in the first instance. If she did not cause her so to be set on fire at all, a claim for putting out the fire is a just one. If the tug did wrongfully cause the schooner to be set on fire, a claim by the tug for putting out the fire which she herself wrongfully caused would be preposterous. We should not present it.

We confine ourselves, therefore, to the only question in either case, whether the tug wrongfully caused the schooner to be set on fire:

1. We say that she did not. It might be argued with a certain plausibility that all that was done here by the captain of the tug, was done under order of the master of the ferry-boat. The tug was a vessel of New York, and when she went into the docks of Hoboken, she put herself under the authorities there. Both the master of the Hoboken ferry-boat and the engineer of the Hoboken fire department were aboard of the tug when she was drawing the burning ferry-boat out into the stream, and it was *their* men who carried the hempen hawser to the schooner at anchor.

2. It might be argued too with a certain plausibility that the schooner was not anchored in a proper place, just in face of the wharves of the Hoboken ferry.

3. We might assert with more confidence that the absence of a proper "anchor-watch" should bar the schooner's claim, or, at least, and if the tug be found in fault, cause an apportionment of the damages.* A considerable time elapsed from the time that the hawser was burnt on the third occa-

* The Sapphire, 11 Wallace, 164; The Indiana, Abbott's Admiralty Report, 330, 335; Clapp v. Young, 6 Law Reporter, 111.

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sion till the burning ferry-boat ran afoul of the schooner. Had there been an anchor-watch he could have sheered, by means of the wheel, and slipped his chain, when the schooner would have drifted, and the catastrophe would have been avoided. But none of these arguments are pressed by us, much stronger ones remaining.

4. Admitting that *if* anything was wrongfully done by any one in the case, the tug was responsible for it all, we assert that nothing was done wrong by any one; that the case was one of misfortune, or, as it may be equally well called, of inevitable accident.

It is to be observed in the first place that it is the interest of shipping that an enterprising company, like the one which owned this tug—a company which, at great expense, fits up a tug with powerful steam-pumps, and keeps the vessel ready with her fires banked, night and day, to move on a moment's notice everywhere about a harbor for useful service—should be encouraged. If in a great and sudden emergency it have not done everything which on a retrospect, coolly made after the event, may appear to have been the best thing, it should not be dealt with hardly.*

Now, it is in evidence that such an occurrence as having to tow a vessel in flames was a very rare one, though extinguishing fires while they are in dock or at anchor may not be so uncommon a one; and that Manilla hawsers are the only hawsers in use in towing vessels. It is plain too on ascertaining that the fire could not be got under by the fire engines and pumps—the fire gaining upon these efforts, the flames having already broke out under the guards and reached her joiner work—that the only means of saving the ferry-boat and preventing the spread of the conflagration to the wharves and adjacent buildings and other property, was an *immediate* removal of her out of the slip, with a view, if possible, of beaching her on the nearest flat; it not being possible from the condition of her deck to bring her to

* Nield v. London and Northwestern Railway Company, Law Reports, 10 Exchequer, 7; also, Torbush v. City of Norwich, 38 Connecticut, 225.

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anchor after getting out of the slip. A very short time, it is admitted, occurred between the time when the order was given to tow the boat out and the time when she was towed out. The occasion was emergent. Confusion prevailed. There was no *one* person in admitted command anywhere. The captain of the tug acted entirely well, therefore, in towing out the vessel with such hawsers as she was provided with, and as were at her command, though they were not incombustible. The case falls within Sir Francis Bacon's illustration of the fifth rule of his Elements of the Common Law,* where, in illustration of his maxim *Necessitas inducet privilegium quoad jura privata*, he says:

"The law chargeth no man with default where the act is compulsory and not voluntary, and where there is not a consent and election; and, therefore, if either there be an impossibility for a man to do otherwise, *or so great a perturbation of the judgment and reason as, in presumption of law, man's nature cannot overcome*, such necessity carrieth a privilege in it."

If these views be correct the claim for salvage is obviously just, and need not be enforced. The tug was not the cause of setting the schooner on fire, and was the cause of saving her after she had taken fire.

Mr. E. H. Owen, contra:

The first three positions of opposing counsel are but feebly defended. They cannot be maintained.

1. The burning ferry-boat was in charge of the tug, and the captain of the latter was in command of all, though others may have aided him. Though the owners of the ferry-boat may have advised or even ordered the tug to take the vessel out of the dock, they did not order the tug to set our schooner on fire.

2. The schooner was lawfully lying at anchor near the middle of the river; a place where all vessels anchor. She had a good and sufficient anchor-light—that is to say a light

* Bacon's Works, Montague's edition, vol. 18, p. 160.

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Argument for the owners of the vessel at anchor.

set in her forerigging—burning brightly. This is not disputed.

3. That she had no sufficient anchor-watch on duty at the time was not a fault. The statutory rules did not require such a watch. All that is required of a vessel at anchor is to have a proper light displayed.* It is not customary for vessels like the schooner to have an anchor-watch, unless it be when there is fog, or the weather is boisterous and dangerous. But the want of an anchor-watch did not cause the collision.

It is said, however, that if there had been an anchor-watch when the danger became imminent the schooner might have been sheered by the use of her wheel or her cable slipped, and so got out of the way of the burning boat. This is assumption merely. With all hands on deck she could not have been sheered far enough either way to avoid the burning boat. The ferry-boat was 164 feet long, and it came down broadside towards and upon the bows of the schooner, and struck her about midship, and, therefore, to have avoided her, the schooner must have sheered over 82 feet, which was impossible, and so the master testifies.

Nor could the cables have been slipped by a single watchman. The necessity for so slipping the cable did not arise until the boat was coming down upon the schooner, when it would have been too late to call all hands from below.

4. The ground chiefly relied on by opposing counsel is as little to be maintained as any one of the others. Whoever attempted the removal of the burning boat was bound to use precautions to prevent her from being carried by wind and tide against other vessels lying at anchor in the harbor, corresponding to the danger and consequences of such a result. The danger was extraordinary, and more than usual precautions to secure and retain control of the burning mass were, therefore, required by ordinary prudence. Reasonable care in such circumstances is not to be determined by the ordinary usages of tugs engaged in towing when no such

* 13 Stat. at Large, 59, Art. 7.

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circumstances of peril to others existed. Proofs, therefore, of the customary practice of tugs engaged in towing vessels in and about the harbor, to use hempen hawsers only, does not furnish a satisfactory test of the caution and care due from a tug-boat professedly engaged in the business of rescuing vessels from conditions of extraordinary peril, including fire on board.

It is obvious that a chain attached to the burning boat would have prevented the loss of control over her. The use of such a chain is not proved impracticable, and it is equally obvious that it was not only practicable but easy.

No heavy anchor-chain extending from one boat to the other, which the hands of the boat could not manage, was required. All that was essential was that the attachment to the burning boat extending a few feet therefrom should be incombustible. For the rest a rope or hempen hawser was sufficient. The parties expected the flames to spread through and over the burning boat. It was this expectation which induced the attempt to remove her from the slip. In view of this it was negligence to remove her under no other control than a rope which presumptively would be burned off so soon as the expected spread of the fire should reach it. In this respect it was not like a shifting of the location of the boat with a view to the extinguishment of the fire before it should thus extend. Before any hawser was attached for the purpose of drawing her from the slip, chains were to be found both on the ferry-boat and on the tug, and it is not to be doubted that a chain of suitable length to form a connection of the hawser to the burning boat might readily have been elsewhere procured.

5. These views, as we conceive, are so obviously right that we need say nothing about salvage; that claim falling to the ground as of course, if the decree of the court below giving damages against the tug for wrongfully setting the schooner on fire, is sustained.

Mr. Justice CLIFFORD delivered the judgments of the court, giving an opinion in each of the cases. The opinions were as follows:

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Opinion of the court.—The claim on the tug for damages.

I.

IN THE CLAIM FOR DAMAGES.

(*The Clarita.*)

I. Vessels engaged in commerce are held liable for damage occasioned by collision on account of the complicity, direct or indirect, of their owners, or the negligence, want of care or skill on the part of those employed in their navigation. Owners appoint the master and employ the crew, and consequently are held responsible for their conduct in the management of the vessel.*

Whenever, therefore, a fault is committed whereby a collision ensues, that fault is imputed to the owners, and the vessel is just as much liable for the consequences as if it had been committed by the owner himself. Consequences of the kind, however, do not follow when the person committing the fault does not in fact or by implication of law stand in the relation of agent to the owners. Unless the owner and the person or persons in charge of the vessel sustain in some way towards each other the relation of principal and agent the injured party cannot have his remedy against the colliding vessel.

By employing a tug to transport their vessel from one place to another the owners of the tow do not necessarily constitute the master and crew of the tug their agents in performing the service, as they neither appoint the master of the tug nor employ the crew, nor can they displace either one or the other. Their contract for the service, even though it was negotiated with the master of the tug, is, in legal contemplation, made with the owners of the vessel employed, and the master of the tug continues to be the agent of the owners of his own vessel, and they are responsible for his acts in her navigation and management.

Apply those rules to the case before the court, and it is clear that the owners of the burning ferry-boat are not liable

* Sturgis v. Boyer, 24 Howard, 128.

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for the consequences of the collision, as the evidence shows to a demonstration that the steam-tug was in the charge of her own master and crew, and that those in charge of her undertook, in the usual and ordinary course of her employment, to transport the burning ferry-boat from one place to another over waters where such accessory motive power is usually employed, and consequently that the steam-tug, in the absence of the officers and crew of the tow, must be held responsible for the proper navigation of both vessels, and that third persons suffering damage through the fault of those in charge of such motive power must, under such circumstances, look to the steam-tug, her master or owners, for the recompense which they are entitled to claim on account of any injuries that their vessel or cargo may receive by such means.

Whether the party charged ought to be held liable is made to depend, in all cases of the kind, upon his relation to the wrong-doer. Where the wrongful act is done by the party charged, or was occasioned by his negligence, of course he is liable, and he is equally so if it was done by one towards whom he bears the relation of principal, but the liability ceases, in such a case, where the relation of principal and agent *entirely* ceases to exist, unless the wrongful act was performed or occasioned by the party charged. Grant that and it follows, beyond peradventure, that the owners of the ferry-boat are not responsible for the consequences of the collision, as it is clear that the officers and crew of the steam-tug were the agents of the owners of their own vessel and not of the burning ferry-boat.

II. Suppose that is so, still it is insisted by the respondents that those in charge of the steam-tug were without fault; that the collision, as far as they are concerned, was the result of inevitable accident, though they insist that it might have been prevented by proper care on the part of those in charge of the schooner.

Obviously the defence of inevitable accident finds no support in the evidence, even upon the theory assumed by the respondents, as they insist that the collision was occasioned

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by the fault of the schooner. Such a defence can never be sustained where it appears that the disaster was caused by negligence, for if the fault was committed by the respondent *alone* then the libellant is entitled to recover, or if by the libellant then the libel must be dismissed, or if both parties were in fault then the damages must be apportioned equally between the offending vessels.* Unless it appears that both parties have endeavored by all means in their power, with due care and a proper display of nautical skill, to prevent the collision, the defence of inevitable accident is inapplicable to the case. None of the circumstances given in evidence favor such a theory, as the collision occurred on a fair, clear evening and in the open harbor, and inasmuch as the primary cause that led to it was one which ought to have been foreseen and removed by the employment of other means to attach the two vessels together it is plain that the case is one of fault.†

III. Two faults are imputed to the schooner: (1.) That she was anchored in an improper place. (2.) That she had no watch on deck.

1. Argument to show that the collision occurred is unnecessary, as the fact is admitted, and it is equally clear that the schooner was lying at anchor with the signal light displayed required by the act of Congress, and under those circumstances the rule is well settled that the burden of proof is upon the respondents to show either that the steam-tug was without fault or that the collision was occasioned by the fault of the schooner, or that it was the result of inevitable accident.‡

Neither rain nor the darkness of the night nor even the absence of a light from a vessel at anchor, said this court, nor the fact that the moving vessel was well manned and furnished and conducted with caution will excuse such mov-

* Morning Light, 8 Wallace, 557; Steamship Company v. Steamship Company, 24 Howard, 313.

† The Erskine, 6 Notes of Cases, 633.

‡ The John Adams, 1 Clifford, 413; The Lochlibo, 3 W. Robinson, 310; 1 Parsons on Shipping, 578.

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ing vessel for coming in collision with the vessel at anchor in a thoroughfare out of the usual track of navigation.*

Mr. Parsons lays down the rule that if a ship at anchor and one in motion come into collision, the presumption is that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been.†

Undoubtedly if a vessel anchors in an improper place she must take the consequences of her own improper act.‡ But whether she be in a proper place or not, and whether properly or improperly anchored, the other vessel must avoid her if it be reasonably practicable and consistent with her own safety.§

Attempt is made in argument to show that the schooner was anchored in an improper place, but both the subordinate courts were of a different opinion, and the court here, in view of the whole evidence, concurs in the conclusion that that defence is not sustained.

2. Concede all that, and still it is contended by the respondents that the schooner was in fault because she did not have a sufficient watch, but the act of Congress contains no such requirement, and inasmuch as the evidence shows that the schooner was anchored in a proper place and that one of her crew was on deck, the court is of the opinion that the charge of fault made against the schooner in the answer is not sustained.

IV. Plenary evidence is exhibited that all the parties present on the occasion expected that the flames would presently burst through the decks of the ferry-boat at the time the steam-tug made fast to her in order to drag her from the slip where she lay, and to move the vessel into the stream, and both parties agree that it was in view of that expectation that the decision was made to move the ferry-boat from her resting-place, nor is it questioned by either

* Steamship Co. *v.* Calderwood, 19 Howard, 246.

† 1 Parsons on Shipping, 573; The Granite State, 3 Wallace, 310.

‡ Strout *v.* Foster, 1 Howard, 89.

§ Knowlton *v.* Sanford, 32 Maine, 148; The Batavier, 40 English Law and Equity, 20; 1 Parsons on Shipping, 574.

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party that if those in charge of the steam-tug had used a chain instead of a manilla hawser, the object contemplated might have been safely and successfully carried into effect.

Even ordinary experience and prudence would have suggested that the part of the hawser made fast to the burning ferry-boat should be chain, and that it would be unsafe to use a hawser made of manilla. Where the danger is great the greater should be the precaution, as prudent men in great emergencies employ their best exertions to ward off the danger. Whether they had a chain hawser on board or not does not appear, but sufficient does appear to satisfy the court that one of sufficient length to have prevented the disaster might easily have been procured, even if they were not supplied with such an appliance.

All of these matters were fully considered by the district judge, and the same conclusions at which he arrived were reached by the Circuit Court. In those conclusions the court here concurs.

II.

IN THE CLAIM FOR SALVAGE.

(*The Clara.*)

In this case the owners of the schooner admit that the steam-tug ultimately succeeded in dragging the ferry-boat clear of the schooner, and that she returned to the schooner after the ferry-boat sunk, and that she rendered service in subduing the flames and saving the schooner from complete destruction, but they deny, in the most positive form, that the libellants are entitled to salvage, or to any compensation by the way of salvage on account of the services rendered, for the following reasons: (1.) Because the schooner would not have caught fire if those in charge of the steam-tug had exercised due and proper care in their attempts to tow the burning ferry-boat from her slip up the river. (2.) Because the schooner was run into and set on fire by the carelessness, negligence, and inattention of those who rendered the alleged salvage service, and not from any accident, nor from any fault or neglect of duty on the part of the schooner.

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Opinion of the court.—The claim on the schooner for salvage.

Further discussion of the matters of fact involved in those propositions is unnecessary, as they have all been conclusively determined in favor of the owners of the schooner in what precedes, which leaves nothing for decision in the case before the court, except the question whether the claim for salvage compensation can be sustained in view of the facts set forth in the propositions submitted by the respondents.

Salvage is well defined as the compensation allowed to persons by whose assistance a ship or vessel, or the cargo of the same, or the lives of the persons belonging to the ship or vessel, are saved from danger or loss in cases of shipwreck, derelict capture, or other marine misadventures.*

Other jurists define it as the service which volunteer adventurers spontaneously render to the owners, in the recovery of property from loss or damage at sea under the responsibility of making restitution and with a lien for their reward.†

Persons who render such service are called salvors, and a salvor is defined to be a person who, without any particular relation to the ship in distress, proffers useful service and gives it as a volunteer adventurer without any pre-existing contract that connected him with the duty of employing himself for the preservation of the vessel.

Enough appears in those definitions to show that the elements necessary to constitute a valid salvage claim are as follows: (1.) A marine peril to the property to be rescued. (2.) Voluntary service not owed to the property as matter of duty. (3.) Success in saving the property or some portion of it from the impending peril.

Public policy encourages the hardy and industrious mariner to engage in these laborious and sometimes dangerous enterprises, and with a view to withdraw from him every temptation to dishonesty the law allows him, in case he is

* Maude & Pollock on Shipping, 419.

† Machlachlan on Shipping, 569; The Neptune, 1 Haggard's Admiralty, 236; The Thetis, 3 Id. 48.

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successful, a liberal compensation. Those liberal rules as to remuneration were adopted and are administered not only as an inducement to the daring to embark in such enterprises, but to withdraw from the salvors as far as possible every motive to depredate upon the property of the unfortunate owner.*

Such compensation, however, is not claimable in every case in which work and labor are done for the preservation of a ship and cargo. Suitors, in order to support such a claim, must be prepared to show that the property was exposed to peril and that the undertaking involved risk and enterprise, and that they were successful in securing the property and saving it to the owner, and that the service was voluntary and that it was not rendered in pursuance of any duty owed to the owner or to the property. Conditions of the kind are inherent in the very nature of the undertaking, and salvors, in consideration of the large reward allowed to them for their services, are required to be vigilant in preventing, detecting, and exposing every act of plunder upon the property saved, for the reason that the right to salvage compensation presupposes good faith, meritorious service, complete restoration, and incorruptible vigilance, so far as the property is within the reach or under the control of the salvors.

Seamen belonging to the ship in peril cannot, as a general rule, claim a salvage compensation, not only because it is their duty to save both ship and cargo, if it is in their power, but because it would be unwise to tempt them to let the ship and cargo get into a position of danger in order that by extreme exertion they might claim salvage compensation.†

Pilots, also, are excluded from such compensation for any exertions or services rendered while acting within the line of their duty, but like other persons they may become sal-

* The Island City, 1 Clifford, 228.

† Miller v. Kelley, Abbott's Admiralty, 564; The Perkins, 21 Law Reporter, 87; The Speedwell, Ib. 99.

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vors in legal contemplation, if they perform extraordinary services outside of the line of their duty.*

Neither can passengers claim salvage unless they perform extraordinary service.†

Persons otherwise entitled as salvors cannot be defeated in making their claim because the vessel was fraudulently imperilled by the master, unless it appears that they were parties to the fraud, or were cognizant of it while it was going on and did not interfere to prevent it as far as they could, or unless they endeavored to conceal the master's misconduct and screen him from detection.‡

Where two vessels come in collision, if one is not disabled she is bound to render all possible assistance to the other, even though the other may be wholly in fault.§

Authorities to support that proposition are quite numerous, and it is very clear that if the vessel in fault renders assistance to the one not in fault, the former cannot make any claim for salvage either from the other vessel or the cargo on board, as it is her duty to render every assistance in her power.‖

Services of the kind, when required by duty, do not constitute a claim for salvage, and it is expressly decided that salvors are not entitled to reward for saving property which they had by their own wrongful acts contributed to place in jeopardy, and the court here fully concurs in that proposition.¶

Text writers, also, of high repute adopt the rule that "persons who have contributed to place property in danger cannot be allowed to claim reward for rescuing it from the

* The Andries, 1 Swabey, 226; Same Case, 11 Moore Privy Council, 318.

† The Branston, 2 Haggard's Admiralty, 3, note; The Vrede, Lushington's Admiralty, 322; The Two Friends, 1 Robinson, 285; Maude & Pollock on Shipping, 485; 2 Parsons on Shipping, 268.

‡ The Fair American, 1 Peters's Admiralty, 95; Parsons on Shipping, 285.

§ The Celt, 3 Haggard's Admiralty, 328; The Ericsson, Swabey, 40; The Dispatch, Ib. 140; 1 Parsons on Shipping, 529.

‖ The Iola, 4 Blatchford, 31; 2 Parsons on Shipping, 289.

¶ The Capella, Law Reports, 1 Admiralty and Ecclesiastical, 356; The Queen, Law Reports, 2 Id. 55.

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consequences of their own wrongful acts," which is a principle applicable in all respects to the case before the court.*

Cases may be found in which it is held that when one ship has rendered assistance to another ship belonging to the same owner that the ship rendering such assistance cannot claim a salvage reward, but the better opinion is that the rule laid down in those cases admits of exceptions, as where the services rendered were of an extraordinary character and were entirely outside of the contract duties of those by whom they were rendered.†

Exceptions also exist to the rule that a steam-tug engaged in towing may not, in case she performs extraordinary services outside of her contract, be entitled to salvage compensation, if it appears that the services were meritorious and saved the property from an impending peril which supervened subsequent to the original undertaking.‡

None of these exceptional cases, however, can benefit the libellants in this case, for the reason that the insuperable objection to their right of recovery is that the peril to which the schooner was exposed was caused by those who rendered the alleged salvage service, and to the rule that such libellants are not entitled to recover there are no exceptions when it appears that the suit is prosecuted in behalf of the wrongdoers.

DECREE AFFIRMED IN BOTH CASES.

* Williams & Bruce's Practice, 123; Benedict's Admiralty (2d ed.), 180.

† The Sappho, Law Reports, 8 Privy Council Appeals, 690; Same Case, 8 Moore Privy Council, N. S. 70.

‡ The Potter, Law Reports, 8 Admiralty and Ecclesiastical, 296; The Minnehaha, 1 Lushington's Admiralty, 335; Same Case, 15 Moore Privy Council, 133; Maude & Pollock on Shipping, 479.

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THE GREAT REPUBLIC.

1. In cases of collision, where there is a great conflict of testimony, the court must be governed chiefly by undeniable and leading facts, if such exist in the case. The court so governed in this case.
2. A pilot, when he is close to a vessel before him making movements which are not intelligible to him, ought not, in a case which is in the least critical, to be governed by his "impressions" of what the vessel is going to do. He should make and exchange signals, and ascertain positively her purposed movements and manœuvres.
3. A steamer close to the right bank of a broad river—one, *ex. gr.*, a half a mile broad—which means to cross over and land on the left shore, is not bound, in the first instance, to give *three or more* whistles, which is the signal for landing. It is enough that she give *two* whistles, which is the signal that she is going to the left. The three or more whistles may be given later.
4. Constructions not favorable put on the testimony and manœuvres of a pilot who, it was proved, was "addicted to drinking when ashore," and who confessed to having been drinking on the day when his vessel left port, and within an hour of which time a collision occurred; though he swore that he had not taken any drink for six hours before his boat left its dock.
5. Similar constructions put on the conduct of a captain whose watch it was, but who, instead of being engaged in a proper place in superintending the navigation of his vessel, was on the lower deck conversing with a passenger.
6. A large and fast-sailing steamer is bound to act cautiously when overtaking and getting near to a small and slow one; and a collision having occurred between two steamers of this sort, a minor fault of the small and slow steamer was held not to make a case for division of damages where such fault bore but a little proportion to many faults of the large and fast one.
7. When, in a case of collision, it appears that one of the vessels neglected the usual and proper measures of precaution, the burden is on her to show that the collision did not occur through her neglect.

APPEAL from a decree of the Circuit Court for the District of Louisiana, which court, on appeal from the District Court sitting in admiralty, had dismissed a libel filed by the steamer Cleona against the steamer Great Republic, for a collision.

The case was thus:

At about five o'clock on the afternoon of the 28th of

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Statement of the case.

August, 1869, the Cleona, a small stern-wheel steamer of one hundred and eighteen tons, and whose speed was about seven miles an hour, left New Orleans bound up the Mississippi to Donaldsonville (a place seventy-five miles above New Orleans), with an assorted cargo of merchandise for various plantations on the two banks of the river. In a little more than half an hour afterwards the steamer Great Republic, a heavy side-wheel vessel of two thousand two hundred tons, running at the rate of twelve or fourteen miles an hour, and therefore one of the fastest on the Mississippi, set off up the river bound on a voyage to St. Louis. The Cleona, as she went up the river, had been, all the time, and was now, in her full view.

Sailing up the stream the Cleona had now twice made landings; first at what is known as the Stock-wharf, in the upper part of New Orleans, and afterwards at a point known as the Nine-mile Point, a point above the city on the opposite or western bank of the river.

Having made this second landing she steered for the other or eastern bank—the stream being in all this part of it about half a mile wide—and then after straightening up and running for some time parallel with the eastern bank and within about forty-five yards of it—turned somewhat shortly to cross to a place called Waggaman's Landing, on the western side, at which she wanted to discharge a part of her cargo. She was now perhaps two miles above the Nine-mile Point.

The Republic, from the time that she began to overtake the Cleona, had followed much in her course—this line perhaps being the one indicated more or less by the channel—and was so following when the Cleona steered from the Nine-mile Point to the eastern bank. Of course the Republic was rapidly gaining on the Cleona, and if no catastrophe had occurred, would have passed her.

By the rules of navigation on the Mississippi one whistle from the steam pipe indicates that a steamer wishes to pass on the starboard or right side; two, that she wishes to pass on the larboard or left, and three or more, that she is going to cross and land.

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How far the Republic was behind the Cleona when the latter turned from the eastern bank to cross to Waggaman's Landing, was a matter about which the testimony was widely discrepant; the witnesses in behalf of the Cleona asserting that it was from six hundred to seven hundred and fifty yards, while those of the Republic fixed it, some of them, so low as forty yards, while all brought it within three hundred.

The river, as already said, was in this part of it a half a mile wide. There were no obstructions in it. Dusk was supervening, but it was not dark; objects being visible to both vessels, alike on the shores and on each other.

When the Cleona turned to cross from the eastern bank to Waggaman's Landing, the captain of the Republic, whose watch it was, was on the lower deck of the steamer conversing with a passenger. The passenger saw the Cleona turning, and said to the captain, "Why, she is taking a sheer." The pilot of the Republic was of the same impression. Instead, therefore, of keeping his own course, he followed the Cleona's. He perceived, however, before very long his mistake, as did all on both vessels very soon that a catastrophe was impending.

What signals were given in this state of things was, as usual in cases of collision, a matter where the evidence conflicted. But the result of the conjoint courses of the two vessels, and action on board of them—that is to say, on the one hand, of the Cleona's turning short to cross when the Republic was so near behind, and on the other, of the Republic's supposing that the Cleona still meant to go up the river, and attempting to follow her—and either of improper signals or inattention to right signals on one or other of the vessels, or on both—was a collision, by which the Cleona was careened, her stern end cut off, and two persons thrown off her into the river and drowned; a catastrophe the more deplorable since the evidence made it plain that if the boats had had fifteen seconds more time—if one of them had been ten feet further on, or the other ten feet further off—all misfortune would have been avoided; and that even five feet

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in the change of their positions would have prevented any serious injury.

We have already said that the testimony was discrepant.

The pilot of the Republic testified thus:

"When I arrived below the Twelve-mile Point I saw the Cleona sheer to the larboard. She gave no signal *when* she thus started. *After* she had been running out about half a minute she gave the signal—two blasts of her steam whistle, which were given just as fast as a man can blow them on a steamboat—and continued her course out. As soon as I saw her sheer to the larboard, I, too, pulled to the larboard and was so swung—all helm—thinking that she was running off from the shore. When she started off to the larboard, I was below her in the current from two hundred and fifty to three hundred yards, and to the larboard of her about the same distance. Immediately after she sheered I pulled my boat, as I have said, to the larboard, rang, first, both stopping-bells, and then the backing-bells. I then told the boat's clerk who was in the pilot-house at the time, to halloo through the trumpet on the larboard to the engineer to 'back *hard*.' I hallooed the same thing through the starboard trumpet. The engineer on that side hallooed to me that the boat was backing as hard as she could. *I cannot say how long the Republic had been backing when she struck the Cleona.* The Republic being a low-pressure boat, it is impossible for the pilot to tell when she is backing until he feels the vibration of the wheels. It was, I suppose, about half a minute from the time the backing bells were rung until the collision occurred; not over half a minute. From the vibration of the boat, I was certain that the Republic was backing before she struck the Cleona."

The engineer of the Republic testified thus:

"The bells on both sides were rung to stop both engines. The engines were stopped immediately. Then the check bells, one on each side. This was a notice to us to prepare to back. The engines were checked immediately. Then the backing bells rang on both sides. Both engines backed immediately. No time was lost in obeying these orders. My assistants were very good assistants, and handled the engines very well.

"I did not see the collision nor feel the jar of it. I knew

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nothing of it until some time after it had occurred. I therefore don't know how far the Republic was from the Cleona at the time the bells were rung, nor what length of time elapsed between the first ringing of the bells and the collision; *but we were alongside of the Cleona before the larboard engine was stopped. I saw her from the engine-room. The Great Republic, if going up stream at twelve or fourteen miles an hour, can be stopped dead in seventy-five yards.* We can stop her in this way because she is a low-pressure boat."

Witnesses, including the pilot from the Cleona, testified, on the other hand, that as the Cleona's head was directed across the stream, one blast of the whistle was blown as an indication for the Republic to keep to the right, which, had she done it, would have prevented all injury; that the Republic not minding that signal, the signal was repeated in about one minute and a half afterwards; that the Republic neither answered nor obeyed the signals, but kept running on; that the pilot of the Cleona seeing a collision impending, and one which, if the two vessels kept their then courses, would cut the Cleona in two, ordered on all head of steam and headed his vessel down stream, so as that the blow, if inevitable, might cut her wheel off, or cut off only an edge of her stern; that by this manœuvre the injurious effect of the collision was mitigated; that, notwithstanding this, the Republic came upon the stern extremity of the Cleona with tremendous force, causing her to turn partially over, and throwing, as already stated, two persons overboard, who were drowned, and wholly disabling the Cleona, whose surviving passengers sought safety on the Republic.

A witness who had been a passenger on the Republic also testified to the bad action of her pilot, and to other unfavorable matters. He said:

"I am a pilot by profession, and have been for sixteen years. When the Cleona swung round to cross, Mr. Fulkerson, one of the pilots of the Republic (not at the time in charge of the wheel), with whom I was conversing, said: 'Look at that fellow. What is he going to do?' I replied, 'I suppose that he is going over the river to land.' I think that it was prudent for the

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Cleona to have attempted to cross the river where she did if she had business on the other side. She was then from three hundred to five hundred yards ahead of us. I do not think that at that time the Republic could have passed between the Cleona and the shore. The Cleona blew two whistles; two *distinct* blowings. Had not the Republic changed her course there would have been no collision. A little before the collision, and when the Republic was about one hundred yards from the Cleona, Mr. Fulkerson remarked to me that if his partner (that is to say, the pilot then in charge of the wheel) did not stop the Republic, she would be into the Cleona. I do not know whether her wheels were stopped at all before the blow. The Republic gave no signal. Properly it was her duty to give the first signal, stating which side she would take, as she was gaining on the Cleona."

Testimony was brought in behalf of the Cleona to show that, when "ashore," the pilot of the Republic was addicted to drinking spirituous liquor, and had been drunk on shore, though the witness "had never seen him at the wheel in an intoxicated state."

The pilot himself, on cross-examination, said:

"I sometimes drink spirituous liquors. I took none for six hours before the Republic left port on that day. I could not say how many drinks I took. I did not keep any account of them."

The court below (herein affirming the decree of the District Court) considered that the Cleona had crossed the river without proper signalling, too much under the bow of the Republic, and in the current, and that this was the cause of the disaster.

Its view was thus expressed:

"The act of crossing the bow of a boat when in close proximity is forbidden by the rules of navigation, and is a most dangerous and reprehensible action at any time. No prudent pilot will attempt it. In the case of the Cleona, it was doubly dangerous, as the Republic was gaining on her so rapidly that a collision was probable, especially as the weight of proof seems to show that the signal of the Cleona was two blows of her

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whistle, which signal the pilot of the Republic was bound to interpret as an order to pass to the larboard, which he did.

"When the Cleona first started out from the shore she gave no signal to indicate her course, as she ought to have done; and when, in response to the two blows of the Cleona, the Republic pulled to the larboard, prudence should have dictated to the pilot of the Cleona to have stopped his boat at once and to have backed her heavily, instead of ringing his bell to crack on all steam and cross at all hazards. The pilot of the Republic was indeed guilty of a deviation from the rules and observances of navigation in not answering the signal of the Cleona; and though he acted promptly in letting his boat fall off to the larboard, he ought, in strict duty, to have answered the signal; but this omission had nothing to do with the collision, for his course was fully observed by apparently all on board the Cleona, and the pilot of the Cleona, if he thought that there was a misconstruction of his signal, should at once have stopped his engines and reversed. If this had been done a collision would not have taken place."

From a decree of dismissal of the libel, made on this view, the present appeal was taken.

By the act of Congress of April 29th, 1864, entitled "An act fixing certain rules and regulations for preventing collisions on the water,"* it is enacted:

"ARTICLE 16. Every steamship, when approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse.

"ARTICLE 17. Every vessel overtaking any other vessel, shall keep out of the way of the said last-mentioned vessel."

Messrs. William Tod Otto and J. A. Grow, for the appellants:

The Republic was in fault in five particulars:

1st. In not keeping her course, instead of bearing to the left, and following the steamer Cleona until she ran into that boat.

2d. In not stopping her own engines and checking her speed in proper time.

* 13 Stat. at Large, 61.

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3d. In not altering her course to the starboard by porting her helm, when the collision became inevitable from the course she was pursuing.

4th. In not giving any signal, and in failing and neglecting to answer the signals given by the steamer Cleona.

5th. In her captain, whose watch it was, not having been on watch and control of the navigation of the vessel at the time of the collision; he having been sitting on the lower deck talking to a passenger, instead of being on the roof of the boat, and seeing and superintending her navigation.

Messrs. Durant and Hornor, contra:

The Cleona, whilst ascending the left bank, suddenly, without warning or signalling, changed her course to crossing the river, at a wrong place, not more than three hundred yards ahead of the Republic, *in the current.* The Republic thought she had sheered, and helmed astarboard to give her room to straighten up, but she kept on across, to the pilot's surprise, and gave two whistles and kept on crossing. Then danger became imminent. Then the Republic helmed hard astarboard; first, stopping-bells; then, backing-bells; and had begun to swing heavily to the larboard; but it was not possible to at once overcome momentum or suddenly change the course of the Republic.

I. Admitting the right of the Cleona to cross the river when and where she pleased, still that vessel was in fault in exercising this right, under the circumstances; because it could not be done without the greatest peril to the Cleona herself, and without equal danger to the far more valuable Republic and her freight, and her much larger crew and number of passengers. It is fault for a pilot to persist in the exercise of an undoubted right, when, by refraining from its exercise, damages can be avoided.*

This persistent act of folly on the part of the Cleona in crossing in front of the Republic was the beginning, continuance, and end of the disaster.

* Mayhew v. Boyce, 1 Starkie Reports, 343.

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II. Nor was it fault in the Republic not to answer the Cleona's signals. Because—

1st. They were not the proper signals for a crossing boat.

2d. They were ambiguous signals, and the Republic could not know whether they were intended to direct her to the starboard or to the larboard.

3d. They were in every way calculated to mislead, and should not have been answered.

4th. They were susceptible of three different interpretations; and an answer, even if responsive to the views and intentions of those on the Cleona, would have been useless and unprofitable.

III. The fault was not on the Republic for not replying to the Cleona's signals, but on the Cleona, for having made signals which were no indication of her intention to cross; but which, according to her own account, were given for a different purpose, and so hurriedly, imperfectly, and tardily that any intelligent response to them was impracticable; signals which, if they had been acted upon by the Republic, would in all probability have been followed by a result even more disastrous than the one which took place. This is true at least of her alleged signalling to helm astarboard.

The intemperance of the Republic's pilot has not been proved. There are few seamen who, when ashore, do not occasionally drink strong drink, and sometimes too much of it. Yet those same men, when on duty, or liable to be put on duty, will never touch it. The pilot here had touched nothing intoxicating for seven hours before the catastrophe.

On the whole case, see the *Grace Girdler*.*

Mr Justice DAVIS delivered the opinion of the court.

There is some excuse, even for a party in fault, when two boats collide in tempestuous or foggy weather, or on a dark night, but there are no exculpatory circumstances attending this disaster. It happened before dark, in the middle of the Mississippi, and when the light was good enough to distin-

* 7 Wallace, 196.

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guish small objects on both banks of the river. The weather was clear and calm, and the river unobstructed, affording ample room for passage on either side of the point where the vessels collided.

It is very plain that the collision ought to have been avoided, and the inquiry is, who is to blame for it. It almost uniformly happens in cases of this description that different accounts are given of the occurrence by those in the employment of the respective vessels, and that the court has difficulty in this conflict of evidence of deciding to which side a preferable credence should be given. There are generally, however, in every case, some undeniable facts which enable the court to determine where the blame lies, and this case is one of that character.

There is no dispute that the Cleona was a small stern-wheel boat of the burden of 118 tons, that the steamboat Great Republic was of the burden of 2200 tons; a large and very fast vessel with side wheels; that both boats crossed the river, from the right to the left bank, just above Nine-mile Point, and straightened up on the left bank and ran parallel with the shore for some time, the Cleona being some distance ahead, and the Republic following almost in her wake; that just previous to reaching Twelve-mile Point the Cleona started to cross the river in an oblique direction, intending to make a landing at Waggaman's plantation to put out freight; that the Republic kept bearing to the left, following the Cleona, instead of keeping her course, and finally overtook her about the middle of the river, and that the collision occurred. There is a great deal of discrepancy in the testimony relative to the distance between the two boats at the time the Cleona started to cross for the Waggaman plantation. Under the most favorable circumstances it is impossible to measure distances on the water with accuracy, but in times of excitement there is very little reliance to be placed on the opinion of any one on this subject, and especially is this so when the condemnation of a boat may depend upon it. If the Cleona was only some two or even three hundred yards ahead of the Republic, it was cer-

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tainly imprudent in her officers to undertake to cross the river, but if she was more than double this distance in advance there is no reason why she should not have attempted to cross if she had business on the opposite side.

Without discussing the testimony to show on which side the probabilities are, there are certain things in connection with this part of the case which are inconsistent with the theory advanced by the respondents. According to the testimony of nearly all the witnesses the Republic was going twice as fast as the Cleona, or, in other words, making two hundred yards to the Cleona's one hundred. It is quite clear that the Cleona was not more than forty or fifty yards from the left shore when she turned to cross over, and must have sailed to reach the middle of the river (a half mile wide at that point and confessedly the place of collision) nearly, if not quite, four hundred yards, and occupied, at her rate of speed, at least two minutes of time in doing it. As the Republic was swinging to the larboard, which would increase her distance outside of the Cleona, she must have gone considerably over eight hundred yards to reach the point of collision. Besides, if the distance between the two boats when the Cleona undertook to cross was as short as the respondents say, the collision would have occurred much sooner, as the speed of the Republic, by the weight of the testimony, was twelve miles an hour, enabling her to make three hundred and fifty yards in one minute. It would, therefore, seem quite clear that the Cleona was far enough ahead to cross with safety, on the supposition that the following boat would pursue the prescribed rules of navigation. Apart from this view of the subject the Republic cannot escape condemnation if the case be tested by the account which the pilot at the wheel gives of the affair. He says that he thought when the Cleona turned to the larboard she was sheering—running off from the shore; that at this time the Republic was below her in the current about two hundred and fifty or three hundred yards, and to the larboard of her about the same distance; that as soon as the Cleona sheered to the larboard he pulled to the larboard,

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and rang first the stopping-bells and then the backing-bells, and that the Cleona gave no signal until she had been running out about half a minute, when she blew two blasts of her whistle, and that the collision occurred in about half a minute from the time the backing-bells were rang. This pilot acted on the belief that the Cleona had sheered when she made the sudden turn, and, therefore, followed her until he overtook her in the middle of the river, instead of keeping his course, which the whole evidence shows would have prevented the collision.

That the Cleona's movement was not a mere sheer is manifest enough, but what right had the pilot to proceed on that supposition? Impressions of this sort are not admissible, and ought never to be entertained by a pilot, and if disaster occurs the consequences must rest on the boat he is guiding. The cause of this collision is clearly traceable to this mistake, and, to use no harsher term, the pilot showed great incapacity on the occasion. It was his duty to have kept his course, and if he had done this instead of swinging to the larboard the accident would not have happened. Even had he ported his helm but for a few seconds after the danger was imminent, it would at least have checked the swinging of his boat to the larboard, and this would have prevented the disaster, as the evidence shows ten feet would have cleared the Cleona, and five feet saved everything except a few of her wheel-arms.

As boats are not apt to sheer in deep water there was no excuse for the mistake made by the pilot. If, however, sheering were possible, as it is out of the common course of things, ordinary prudence would have told this pilot to have exchanged signals, so as to have understood what the movement was. Instead of this he did not answer the signals of the Cleona, which the law says he must do, in order to avoid mistakes. Two whistles were blown on the Cleona, which this pilot and others on board the Republic interpreted as meaning but one signal. Whether these whistles constituted one signal or two, answer should have been

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made, and, it may be, if this had been done the result would have been different.

The signals were given by the Cleona for each boat to keep to the right, and, if seasonably given, were the proper ones.

It is said, however, that the Cleona should have given three whistles, indicating a purpose to land, but the boat was not close enough to land, and all the signal that was required was one which should tell which side she desired to take.

But the pilot says no signal was given by the Cleona until half a minute after she turned to cross. If so, and the Cleona omitted such a plain matter of duty, why did he not supply this omission by signalling as soon as he discovered the danger? That he thought danger was imminent as soon as the Cleona made the turn is manifest, because he says he rang the bells at once to stop and back. It was, however, his duty, as his boat was astern and gaining rapidly on the other, to have given the first signal; but even if this were not so, any self-possessed pilot, having a due regard for life and property, as soon as danger was threatening, would have signalled in order to call the attention of the other boat to the condition of things. If this had been done, is there any reason to suppose the signal would not have been obeyed? and if obeyed the courts would never have been troubled with this case. The precautions against danger of necessity, in any case, rest to a greater extent upon the boat in the rear than upon the boat in advance, and this is eminently true of a large and fast steamer following a small and slow boat.*

But the pilot says that as soon as the Cleona turned to cross, he took instant means to stop and back his boat. If so, it is singular that his boat, having two hundred and fifty yards to go, almost in the same direction with the Cleona, run her down with great violence; but the testimony of the engineer of the Republic shows, unmistakably, that the pilot,

* Whitridge et al. v. Dill et al., 23 Howard, 454.

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to say the least, is mistaken in this particular. Indeed, it is very doubtful from the evidence whether the engines of the Republic were stopped at all until the collision occurred, but if they were, it was at a point of time much later than that named by the pilot. It is true the pilot gave the signal to stop and back, and this signal was obeyed, but the engineer does not know how far off the Cleona was when he was signalled to stop and back, nor can he tell what period of time elapsed between the first ringing of the bell and the collision. He does tell, however, the important fact that the Republic, going up stream at the rate of twelve or fourteen miles an hour, can be stopped "dead" in seventy-five yards, and gives the reason why she can be stopped quicker than ordinary boats of her class navigating the Mississippi River.

In the light of this testimony, which must be accepted as true in the absence of any evidence to the contrary, plainly the pilot did not take the steps to check the speed of his boat when he says he did, nor, in fact, until the collision was inevitable.

There is evidence in the record tending to show that the pilot was addicted to drinking when ashore, and he confesses to drinking on that day, but not for six hours before he left port. It may be that he was not under the influence of liquor on this occasion, but if not, his conduct is inexplicable on any other theory than ignorance of the ordinary rules of navigation, or reckless inattention to duty. There were ample means and opportunity to avoid this collision, and yet it occurred. In the midst of danger seconds of time are important, not to speak of minutes, and the clear-headed pilot who recognizes this fact, and makes no ventures, is not apt to bring his boat into trouble. Practical steamboat men, passengers on board the Republic, understood the movement of the Cleona to be for the purpose of crossing the river, and yet the pilot in charge mistook it for sheering. They could see plainly enough if he kept his course the collision would have been avoided, and there was plenty of room to pass on the starboard, and he took exactly the opposite direction. With ability to stop his boat in seventy-

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five yards, he does not do it in two hundred and fifty yards. In charge of the wheel of one of the fastest and largest steamers on the river, and in plain sight, all the way from New Orleans, of a small coasting vessel engaged in landing freight and passengers at the plantations on both sides of the river, he runs her down with such violence as to cause her to careen over, without using any signals at all, or answering those she gave, or taking any precaution until too late to escape danger. If all this does not constitute mismanagement, to use no harsher word, it is difficult to understand what does. The slightest exercise of ordinary skill and prudence would have avoided the accident. Even after the peril was imminent, the simple act of bearing to the starboard, instead of the larboard, would have brought the Republic's stem clear of the Cleona's stern.

There are other witnesses for the respondents who, in the matters of distance and time particularly, differ with the pilot at the wheel, but we do not feel called upon to review their testimony, as it does not, in our judgment, change the result, and would unnecessarily lengthen this opinion.

It may be that this collision would have been avoided if there had been any proper officer in good season on the roof of the Republic superintending her navigation. The pilots seem to have had, on this occasion, the whole charge of her navigation, for the captain, whose watch it was, was sitting on the lower or boiler deck, talking to a passenger, until his attention was called to the danger of a collision.

Under the circumstances of this case, the burden is on the Republic to excuse herself, she being the following vessel, and having actually overtaken the Cleona and run her down. And in any case of collision, whenever it appears that one of the vessels has neglected the usual and proper measures of precaution, the burden is on her to show that the collision was not owing to her neglect.*

If we are correct in our own interpretation of the evidence,

* Meyer v. Steamboat Newport, opinion by Judge Blatchford, 14 Internal Revenue Record, 87; The Schooner Lion, 1 Sprague, 40.

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enough has been said to condemn the Republic, and there is nothing in the record to excuse her.

As we have seen, she could have avoided this collision, even after danger was imminent. If she had stopped, or ported her wheel a second or two before the collision occurred, she would have gone clear of the Cleona. On the contrary the Cleona's course after she saw the Republic following her, was to try and get out of her way. This course she pursued diligently, for she packed on all the steam possible, and succeeded so far as to save her hull, and came near escaping altogether. On a full and fair consideration of the whole evidence, we are satisfied the officers of the Cleona, when the boat was turned to the right shore, had no ground to fear a collision, and that the boat itself was far enough ahead to cross with safety, if the Republic, instead of following after her, had pursued her course on the left side of the river. It is pretty clear that the Cleona did not blow her whistle for each boat to keep to the right, as soon as she started for the opposite shore. This omission was a fault, but this fault bears so little proportion to the many faults of the Republic, that we do not think, under the circumstances, the Cleona should share the consequences of this collision with the Republic.

DECREE of the Circuit Court REVERSED, and the cause remanded, with directions to enter a decree for the libellant and for further proceedings in conformity with this opinion.

REVERSAL AND REMAND ACCORDINGLY.

UNITED STATES v. VILLALONGA.

Under the Abandoned and Captured Property Act, which gives to "the owner" of any such property a right, after it has been sold by the government, to recover the proceeds of it in the Treasury of the United States, a factor who has merely made advances on the property—there

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being another person who has the legal interest in the proceeds—is not to be regarded as "the owner;" at least not to be so regarded beyond the extent of his lien.

APPEAL from the Court of Claims; the case being thus:

The third section of the act of Congress of March 12th, 1863,* which authorizes a suit against the United States for the recovery of the proceeds of sale of captured or abandoned property, enacts that—

"Any person claiming to have been the *owner* of any such abandoned or captured property, may at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of the court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or comfort to the present rebellion, receive the residue of said proceeds after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expense attending the disposition thereof."

Under this enactment one Villalonga filed a petition in the court below to recover the proceeds of four hundred and ninety-three bales of cotton which were seized by the army of the United States at Savannah, in December, 1864. After its seizure the cotton was turned over to the agents of the Treasury Department and sold, and the proceeds of the sale were paid into the treasury. Of the whole number of bales captured, one hundred and ninety-six belonged to Villalonga, but the remainder he had received as a *cotton factor* from various persons, and had made advances thereon in money of the Confederate States. The aggregate of these advances was $51,153. It did not appear from the case as found who these different owners were, how much had been advanced to each, or what was the value of the advances in money of the United States. Upon this state of facts the Court of Claims gave judgment in favor of Villalonga, not

* 12 Stat. at Large, 820.

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only for the proceeds of sale of the cotton which belonged to him in his own right, but also for the entire proceeds of that which he had received as a factor, and upon which he had made advances.

The court rested its judgment upon the case of *Carroll* v. *United States*;* a case in which property owned by a disloyal person, had after his death, and when in the hands of the administrator of his estate, who was loyal, been seized by the government under the above-quoted Abandoned and Captured Property Act, and sold. This court then adjudged, that on a claim by the loyal administrator, the disloyalty of the *decedent* did not bar a recovery; that the administrator, who, said the court, "had a title on which she could maintain trespass or trover," was to be considered "owner," within the meaning of the Abandoned and Captured Property Act.

The Court of Claims, in support of its judgment, said:

"The Supreme Court of the United States decided in *Carroll* v. *United States*, that a suit may be maintained under the Abandoned and Captured Property Act by one who was not the owner in his own right, but who, at the time of seizure, was possessed of the property under a title upon which he could maintain an action of trover or trespass, and who, at the time of bringing suit, was entitled to receive the proceeds as the trustee or representative of parties not before the court. We perceive no difference in principle between the case of an administrator and of a factor in possession with a lien upon the property for advances made. The factor is entitled to hold the property. He may sell it to repay his advances, or maintain an action of trover or replevin, to the exclusion of any action by his principal, and on recovering its value he becomes a trustee of the original owner to the extent of his residuary interest. It may be doubted whether the original owner, not in possession, not entitled to possession, and not primarily entitled to the proceeds, could maintain a suit here under the statute; and it is tolerably certain that he and the factor could not have brought several and conflicting suits for their respective interests, and

* 13 Wallace, 151.

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compelled this court to settle disputed accounts between them. Therefore it seems tolerably clear that this suit is properly brought by the factor, who, on recovering, will be liable to his principal for the surplus after repaying his own advances, as if this suit were an action of trover brought in a court of the common law."

Whether the judgment of the Court of Claims, given on this view of the case, of *Carroll* v. *United States*, was correct on such a state of facts as existed in the present case, was the question now presented, and the answer to it depended, of course, upon the answer to the antecedent inquiry whether, as to the cotton upon which the claimant had made partial advances as a factor, he could be considered the owner thereof, and as having a right to its proceeds, within the meaning of the act of Congress.

Certain laws of Georgia, which the claimant relied on as bearing on his case, were as follows:

"SECTION 1987. The lien given by the common law to attorneys, *factors*, . . . pawnees, and others, under special circumstances (except the vendor's lien), are recognized by and may be enforced under the law of Georgia.*

"SECTION 2090. A factor's lien extends to all balances on general account, and *attaches to the proceeds of the sale of the goods consigned as well as to the goods themselves.*

"SECTION 2965. The owner of personalty is entitled to the possession thereof. Any deprivation of such possession is a tort for which an action lies.

"SECTION 2966. Mere possession of a chattel, if without title or wrongfully, will give a right of action for any interference therewith, except as against the true owner or the person wrongfully deprived of possession.

"SECTION 2967. Trover may be used as a form of action to recover the possession of chattels, an alternative verdict in damages, to be discharged on delivery of the property that has been taken; but it shall not be necessary to prove any conversion of the property where the defendant is in possession when the action is brought.

* Code of Georgia, 1861, pp. 393, 410, 551, 552.

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Argument in support of the factor's "ownership."

"SECTION 2969. In cases of bailments, where the possession is in the bailee, a trespass committed during the existence of the bailment will give a right of action to the bailee for the interference with his special property, and a *concurrent right of action to the bailor for the interference with his general property.*"

Mr. G. H. Williams, Attorney-General, and Mr. John Goforth, Assistant Attorney-General, for the United States, plaintiff in error:

The right of the factor to the possession of this property was limited by the amount of his advances. This would be true putting the case on general principles. And there is nothing in the Code of Georgia which changes these general principles. To the extent of the interference with his "special" property, that code, by its section 2969, gave him an action of trespass, while a concurrent right of action is given to the bailor for interference with the general property. No right is given to the bailee or tenant in possession to recover, in an action in his own name, for the injury done to the rights of the general owner.

The cotton having been taken under authority of law, by a force which the factor could not resist, he has incurred no personal responsibility from its seizure.

The personal loss or damage suffered by claimant, of course, is measured by the value of the advances. He had no interest in the cotton beyond these.

Carroll's case does not sustain the judgment of the court below.

Messrs. J. W. Denvers and C. F. Peck, contra:

It is objected, as respects the cotton not, in fact, owned out and out by Villalonga, that if he was entitled to judgment at all, his recovery should have been limited to his own interest as factor. But a factor who sues, sues in his own right. *He* is owner of the property for the purposes of the suit. In *Carroll* v. *United States*, the administratrix was not more the representative of the testator than the factor here

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was of the owner of the reversionary interest. But this court held the administratrix to be owner.

If this position be true in cases generally, as this court declared it in Carroll's case to be, much more is it true in this particular case. By the law of Georgia, from which State this case comes, the factor is regarded as the *owner* of the property held by him, as against those taking it from his possession. The code (section 2996) gives an action of "trover" in a suit like this, to one who is merely *possessed* of chattels. Now the action of trover is founded on *property;* and property must be alleged in the *narr.* Without property so alleged the action cannot be maintained. The code, therefore, for the purposes of a suit like this one, makes mere possession evidence of property, in other words, declares that the possessor is to be regarded as owner.*

The theory of the Captured and Abandoned Property Act, as explained by this court in *United States* v. *Klein*,† is that property found by armies in the South was gathered and preserved from destruction for the purpose of awaiting such action as the political department of the government might see fit to take; that no title or right was divested by the seizure, but that this was an incipient step by which the United States might afterwards acquire title through appropriate confiscation proceedings in the courts. But where, as in this case, no offence had been committed full restitution should be made. The United States, therefore, in this case became bound to make restitution. Is there any violence done to the course of law, or to the cause of justice, because in a court not governed by common law forms,‡ the factor, from whose possession the cotton was taken, obtains a decree that restitution be made to him? The justice and equity of the case is that the factor should recover the entire proceeds, and make his own settlement with his principals, otherwise the Court of Claims would be compelled to decide between them the questions of commission, storage, amount

* See Note of Sergeant Williams, 2 Saunders, 47 *a*, n. 1.

† 13 Wallace, 128

‡ United States *v.* Burns, 12 Wallace, 254.

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of advances, rate of interest, &c.; and that court was never intended to adjust controversies between individuals, in which the government has no interest.

The principals in this case having clothed the factor with a special ownership in the property, have left him to assert the title for their use and benefit. They have seen fit to continue him as their representative, and are now awaiting a settlement at his hands, as soon as he shall receive the proceeds of the property intrusted to him.

The appellant assumes that if the principals could maintain their action here, then the factor cannot recover for their interests. This is a mistake. There are many cases in which an election is given either party may bring the action, but one only can recover.

"In the case of a general as well as special property, the action may in most cases be brought either by the general or special owner, and judgment obtained by one is a bar to an action by the other."*

And this principle is applicable to actions *ex contractu*, as well as to actions founded in tort.†

Reply:

Though the action of trover is undoubtedly founded on property as distinguished from possession, a *special* property is sufficient to maintain it, and is just as good for that purpose as a general property.‡ Such special property we admit the factor to have, but the general property being still in his principal, our argument remains unanswered. The distinction between the two sorts of property is strongly recognized in section 2969 of the code.

Mr. Justice STRONG delivered the opinion of the court.

No doubt a factor who has made advances upon goods consigned to him, may be regarded, in a limited sense, and

* 1 Chitty on Pleading, 140, 9th American edition, by Perkins, note 4, citing Smith v. James, 7 Cowan, 328.

† 1 Parsons on Contracts, ch. 3, § 6.

‡ See note of Sergeant Williams cited *supra*, p 40.

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to the extent of his advances, as an owner. Yet, in reality, he has but a lien with a right of possession of the goods for its security. He may protect that possession by suit against a trespasser upon it, and he may sell the property to reimburse advances; remaining, however, accountable to his consignor for any surplus. But after all he is not the real owner. He is only an agent of the owner for certain purposes. The owner may, at any time before his factor has sold the goods, reclaim the possession upon paying the advances made, with interest and expenses. He has not lost his ownership by committing the custody of the goods to a factor and by receiving advances upon them. He is still entitled to the proceeds of any sale which may be made, even by his agent, the factor, subject only to a charge of the advances and expenses. A factor, therefore, notwithstanding he may have made advances upon the property consigned to him, has but a limited right. That right is sometimes called a special property, but it is never regarded as a general ownership. At most, it is no more than ownership of a lien or charge upon the property. Such is unquestionably the doctrine of the common law. And there is nothing in any statute affecting this case that changes the doctrine. Certainly the statutes of Georgia, whence this case comes, have no such effect. In the code of that State of 1861, while a factor's lien is recognized and declared to extend to all balances on general account, and to attach to the proceeds of sale of goods consigned as well as to the goods themselves, there is nothing that declares he has anything more than a lien protected by his possession. Injuries to that possession may indeed be redressed by action in his name, and it may be assumed that upon contracts of sale made by him he may sue, but all this is perfectly consistent with the continuance of the general ownership in his consignors until he has made a sale. And there is a very significant clause in the statutes of the State which shows that a factor there has not the general property. In section 2969, of the article respecting injuries to personalty generally, it is enacted that "in cases of bailments, where the possession is in the bailee, a tres-

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pass committed during the existence of the bailment will give a right of action to the bailee for the interference with his *special property*, and a concurrent right of action to the bailor for interference with his *general* property." If this applies to the case of bailment to a factor, as is supposed by the defendant in error, it is a clear declaration that the factor's right does not extend beyond a special property, a mere right to hold for a particular purpose, and that it does not amount to ownership of the property consigned to him. And there is nothing in the new code of Georgia, or in any of the decisions of the Supreme Court, that is variant from this. Admit that a factor may maintain an action when his possession is disturbed, still it is a question what may he recover? Under the statutes of Georgia he can recover only for the injury which his special property, namely, his lien, has sustained. For all beyond that, the general owner may sue. The property of that owner is not vested in his factor.

If, then, it be, as was said by the Chief Justice in Klein's case, that the government constituted itself the trustee of captured or abandoned property for the original owners thereof, it is hard to see how the trust can exist for the benefit of the owner of a special property therein beyond the extent of his interest, which, as we have seen, in case of a factor, is measured by the amount of his advances and expenses.

For all beyond that, by the law of Georgia, the original owner who consigned the goods to the factor might sue, and for that original owner the government became a trustee of all beyond the factor's interest, according to the doctrine of Klein's case.

In this view of the case in hand it is clear that the claimant is not the "owner of the" captured "property," "having a right to the proceeds thereof," within the meaning of the Captured or Abandoned Property Act. He owns of the cotton consigned to him nothing but a lien for his advances and expenses, and he is, therefore, not entitled to the entire proceeds of the sale of the property.

There are other considerations that support this conclu-

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sion. Plainly it was the intention of Congress, manifested in the statute, that no person should be permitted to recover out of the treasury any of the proceeds of sale of the property captured or abandoned, except those who had given no aid or comfort to the rebellion. But if a factor who has made advances, no matter how small, may recover the entire proceeds of a consignment made to him, not only what he has advanced, but the share of his principal, the intention of the law may be wholly defeated. He may have received consignments from persons most active in promoting the rebellion, and he may have advanced only one dollar on each bale of cotton consigned. If, now, he can recover the entire net proceeds of the sale of such cotton paid into the treasury, his consignors, through him, using him as a cover, escape entirely from the operation of the provision of the statute—that no one shall have a standing in the Court of Claims who has given aid and comfort to the rebellion. A construction of the law which admits of such a consequence cannot be correct. The intention of Congress is not thus to be evaded.

There is yet another consideration not to be overlooked. Under the act of March 3d, 1863,* amending the act to establish the Court of Claims, that court has power to consider and determine all set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other claims which the government may have against any claimant in the court, and render judgment against such claimant if he be found indebted to the government. Can a debtor to the United States evade his liability to a judgment against him by consigning his property to a factor and obtaining some advances? May the factor recover all that is in the treasury, though the government may have large claims against his principals, who are the real parties in interest? We cannot think the acts of Congress admit of such an interpretation. These considerations show that the "owner," spoken of in the third section of the Captured and Abandoned Property

* 12 Stat. at Large, 765.

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Act, "having a right to the proceeds thereof," is he who has the legal interest in those proceeds, and that a factor who made advances before the capture can, at most, recover only to the extent of his lien.

The court below rested their judgment upon Carroll's case, but that case, in our opinion, has little analogy to this. There, an administratrix of a deceased person was the claimant, and it was held to be no bar to the suit that the decedent gave aid and comfort to the rebellion, the property having been taken after his death from the administratrix, and not from him, and the administratrix was declared to be the owner within the meaning of the statute. Undoubtedly she was the full legal owner, entitled both in law and in equity to the entire property. Hers was the only title which existed at the time of the capture. Through whom she acquired it was deemed immaterial. It was sufficient that no other person had a definite right. This is no such case. Here there are owners, both in law and in equity, other than the claimant, and the statute has opened the Court of Claims for them, if they have never given aid or comfort to the rebellion. The present claimant, at most, is entitled to no more than the net proceeds of sale of his own cotton, one hundred and ninety-six bales, and the amount of his advances on the other cotton, reducing those advances to their worth in the money of the United States at the time the advances were made.

JUDGMENT REVERSED, and the cause REMITTED with instructions to proceed

IN CONFORMITY WITH THIS OPINION.

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COUNTY OF ST. CLAIR *v.* LOVINGSTON.

1. Where a survey begins "on the bank of a river" and is carried thence "to a point in the river," the river-bank being straight and running according to this line, the tract surveyed is bounded by the river. It is even more plainly so when it begins at a post "on the bank of the river, thence north 5 degrees east up the river and binding therewith."
2. Alluvion means an addition to riparian land, gradually and imperceptibly made, through causes either natural or artificial, by the water to which the land is contiguous.
3. The test of what is gradual and imperceptible is that, though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on.
4. It matters not whether the addition be on streams which do overflow their banks or those that do not. In each case it is alluvion.

ERROR to the Supreme Court of Illinois.

The county of St. Clair, Illinois, brought ejectment against Lovingston, for a piece of land within its own boundaries, situated on the east bank of the river Mississippi (as its east bank now runs), opposite to St. Louis. The land was confessedly "made land;" that is to say, it was land formed by accretion or alluvion, in the general sense of that word; though whether it was land made by accretion or alluvion in the technical or legal sense of the word was a point in dispute between the parties in the case. The bank of the river had confessedly, in some way, been greatly changed, and, in this part, added to. The tract in dispute is indicated on the diagram upon the next page, by the deeply shaded or most dark part of it; the part at the bottom of the diagram and on the left hand side of it.

The case was thus:

Before the year 1815, and in pursuance of an early formed intention by the government, to give a piece of land to soldiers in the old French settlements in Illinois, a survey was made in the public lands for one Nicholas Jarrot, of one hundred acres, which was either *on* or near to the Mississippi River, as it then ran; though whether, in all its parts, *on*

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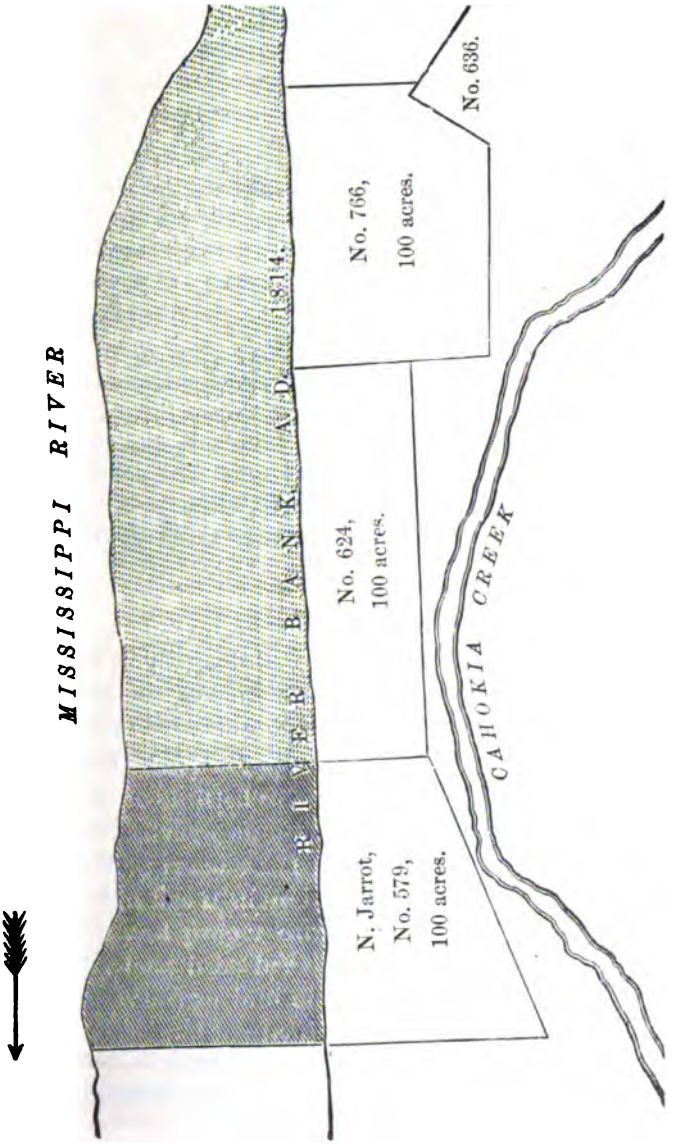
the river or only *beginning* on its bank and leaving a strip or pieces of land between the tract and the river—edges more or less ragged—was one point in the case.

DIAGRAM No. 1.



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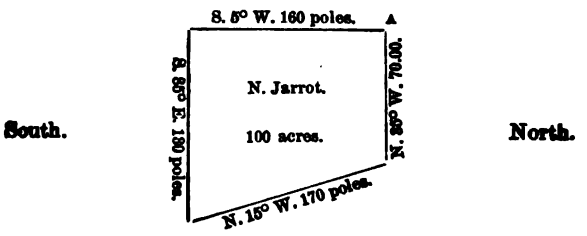
The field-notes and a plot of the tract, as given in proof, were thus:

DIAGRAM No. 2.



"Beginning *on the bank of the Mississippi River*, opposite St. Louis, from which the lower window of the United States storehouse in St. Louis bears N. 70¾ W.; thence S. 5 W. 160 poles *to a point in the river* from which a sycamore 20 inches diameter bears S. 85 E. 250 links; thence S. 85 E. 130 poles (at 30 poles a slash) to a point; thence N. 15 W. 170 poles to a forked elm on the bank of Cahokia Creek; thence N. 85 W. 70 poles to the beginning."

At the time of this survey the west line of the tract, if not in all its course *on* the river, was confessedly in all its course near to the river; the general course of the river-bank in 1814, just before the survey, being indicated on the Diagram No. 1 by the words "River-bank in 1814;" and the tract, the field-notes of whose survey are above given, being marked on that diagram as "No. 579, N. Jarrot."

To the north of this tract of one hundred acres to Jarrot were two other tracts, each of one hundred acres. They are numbered on the Diagram No. 1, the one 624 and the other 766, and their general position is thus shown. Jarrot, in virtue of a transfer from some other French settler, claimed also this latter tract, No. 766.

At a later date, that is to say in 1815, a certain Pierre Coudaire got a survey which covered the whole of the three

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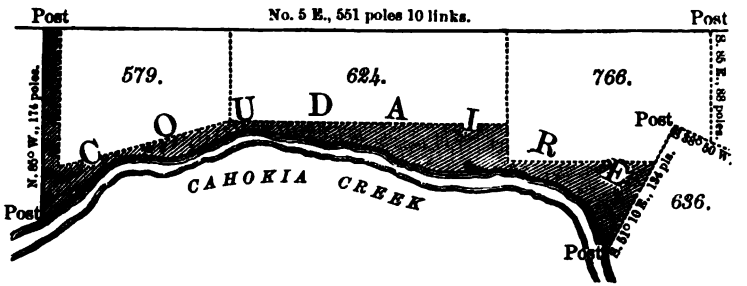
abovementioned tracts, and some irregular edges on the east between them and the Cahokia Creek, as also a small strip bending round and going to the south of the southernmost of the three tracts, or tract No. 579. What this survey embraced on the west—that is to say, on the river side—not embraced by the surveys of the others, or, more especially, and so far as that extent of line was concerned, not embraced by the west line of tract No. 579—and whether it embraced anything at all—in other words, whether it brought the title any more upon or to the river than the old surveys—was one of the questions of the case. The field-notes of Coudaire's survey, which a drawing, Diagram No. 8, thus illustrates, called for a post in the northwesterly line of survey

DIAGRAM No. 8.

MISSISSIPPI RIVER



636 as the point of beginning; thence south 88° 50′ west with said line 17 poles to a post; thence south 51° 10′ east with another line of said survey 134 poles, to a post on the west side of Cahokia Creek; "*thence down the said creek with its different courses;*" thence by courses and distances described to a post. The field-notes then continued:

"Thence 85° W. 174 poles to a post *on the bank of the Mississippi River*, from which*—thence N. 5° E., up the Mississippi River and binding therewith (passing the southwesterly corner of Nicholas Jarrot's survey No. 579, claim No. 99, at 6 poles),

* There was a considerable blank here, in which no doubt the bearing of some object was meant to be inserted; though it never was in fact inserted. —REP.

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551 poles and 10 links to a post, northwesterly corner of Nicholas Jarrot's survey, No. 766, claim No. 100, from which a sycamore 36 inches diameter bears S. 21° W. 29 links; thence S. 85° E. with the upper line of the last-mentioned survey 88 poles to the beginning."

The right of Jarrot was confirmed at an earlier date than that of Coudaire. Coudaire's survey bore the number 786.

Several old maps were introduced which seemed to show plainly enough that at the time when the surveys were made the river-bank, in this part of it, ran in what might fairly be called a straight line. Oral testimony in the record proved also that it did so.

We have already said that after the surveys were made the east bank of the river greatly advanced. But what caused this change in position was not quite obvious.

About the time when the new land began perceptibly to form, certain coal-dykes for the accommodation of the public were built above the point where the land in controversy was. The United States also made some improvements to throw the channel of the river more towards the city of St. Louis, that is to say, away from the side where these tracts were, and the city itself put certain large rocks on one edge of the river to preserve its own harbor. How far, exclusively of natural causes, all this had formed the new land was not clear. The evidence showed, however, that the defendants had nothing to do with the making of any of these artificial works, and it was not clear that in a river like the Mississippi the new land might not have been made without them, and by natural causes alone.

The fact that the additions were a making was perceptible at certain intervals, though the additions were too gradual to strike the eye as they were in the actual process of formation.

In this state of things, and a considerable addition having now been made, Congress, on the 15th of July, 1870, passed an act in these words:*

* Chapter 301, 16 Stat. at Large, 864.

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Statement of the case.

"That the title of the United States to all lots, out-lots, tracts, pieces, parcels, and strips of land in St. Clair County, State of Illinois, lying and situate outside of the United States surveys as noted in the field-notes of the United States surveyors, and on the Mississippi River near surveys 766, 624, and 579, . . . &c., be, and the same is hereby, confirmed and granted to said St. Clair County, in said State."

The plaintiff, St. Clair County, claimed under the above-quoted acts, and under certain other acts of legislation, Federal and State, not necessary to be quoted.* Its positions were:

1st. That the west boundary of the earlier and the later survey was the same; that this west boundary was a line originally established irrespective of the river line; that accordingly the lands included by the surveys never extended to the river, and that the new-made land, even if it were "accretion," or "alluvion," never belonged to the owner of tracts surveyed, as riparian owner, but was unconveyed land belonging to the United States, which by its above-quoted act of Congress, it had granted to the plaintiff, St. Clair County.

2d. That if what is above said as to the western line of the tracts as surveyed was not true, and if the tracts did originally extend to the river, yet that the made land was not "accretion" or "alluvion" in a legal sense, since the making had been brought about by artificial means; that therefore the new land belonged to the United States as sovereign.

3d. That even if neither of these two propositions were true, yet that the surveys were specifically brought *to* the river and were limited to one hundred acres each, and hence that they could not embrace an addition as large as or larger than themselves.

4th. That, independently of all other positions, the Mis-

* Act of February 18th, 1871, chapter 58, 16 Stat. at Large, 416; act of September 28th, 1850, chapter 84, 9 Id. 519; also under the acts of the legislature of Illinois of the 22d of June, 1852; of the 12th of February, 1853; of March 4th, 1854; of February 18th, 1859; and of March 11th, 1869.

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sissippi in the sense of the American law—where "navigability" meant navigability in fact—was a "navigable river," as respected riparian rights, and that accretions on it belonged to the sovereign.

The position of the defendant, Lovingston, who held under the two surveys, 579 and 786 (a valid title to which was admitted to be in him, or in those under whom he claimed), was, that those surveys were both (or certainly the last one) bounded originally by the river, and that whether the additions were caused wholly by natural causes or whether in part by the artificial structures, as causes causative, the new land fell within the technical and legal idea of accretion or alluvion, and so belonged to him as riparian owner; and that it made no difference, even if by the terms of the survey or grant the title came originally but *to* the river, or whether the river was a "navigable" one or not.

Of this opinion was the Supreme Court of Illinois, where the case finally came, and where judgment was given for the defendant. The case was now here on error from that judgment.

Mr. Gustavus Koerner, for the plaintiff in error:

The *history* of these hundred acre tracts, often called militia tracts, should be stated by the reporter as part of the case. They are facts, which go to constitute the *case*, and are an important part of it.

So far back as June 20th, 1788, in a resolve of the old Congress of the United States,* a report was made to Congress, and approved by it, for confirming the rights of old French settlers in Illinois.

The Congress under the present constitution in 1791†—re-enacting the resolve of June 20th, 1788—provided in the sixth section that the governor of the Territory should be authorized to make a grant of land, "*not exceeding one hundred acres*, to each person who hath not obtained any donation,"

* 1 Bioren & Duane's Statutes, 208, chap. 101.

† 1 Stat. at Large, 221.

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&c., and who has done militia duty, "the said land to be laid out in such form and place as the said governor shall direct."

Section eight provided that the governor should lay out the said lands agreeably to the act of Congress of June 20th, 1788, an act which provided that they shall be located within certain parallelograms. These parallelograms of one hundred acres each were, of course, defined plats of ground. They made what the Roman law calls *agri limitati.**

Independently of which, it is plain that a grant is not carried to the centre of the stream, but stops at the bank, if the grantor describe the land as beginning *on* the *bank* of a river; or as coming only *to* a post or point *on* the shore; and carries a boundary, not by the stream, but by a straight line between points on its bank. This confines and limits everything to the lines described.

Now, alluvion is an accretion of a tract of land, bounded by a river, *the owner of which is not limited by a certain measure.* It does not apply to the *ager limitatus.* Moreover alluvion must be not only gradual and imperceptible, but be also by *natural causes.*† The causes here were not natural causes, but artificial ones.

The common law as to rivers not navigable has adopted the civil law.‡

We have heretofore referred to the history of those claims; now let us make the application.

The region of country from the mouth of Wood River, a little below Alton, to the mouth of Kaskaskia River, between the bluffs on the east and the Mississippi River on the west, is generally known as the American Bottom. It is about ninety miles long, and averages five miles in width.

At the time of the resolve of Congress, June 20th, 1788,

* Section 20, Inst., De rerum divisione et qualitate; Lex 7, Dig. § 3; also Lex 12 ib.; Lex 16, De acquirendo rerum dominio, 41, 1; Lex 24, Dig. § 3, De aqua et aquæ pluv., &c., 39, 3; Lex 1, § 1, Dig., De fluminibus, 43, 12.

† Section 20, Inst., De rerum divisione, 2, 1; Lex 7, § 1, Dig., De acquirendo rerum dominio, 41, 1.

‡ 3 Washburne on Real Property, *452; Angel on Watercourses, § 53; 1 Bouvier's Law Dictionary, title "Alluvion;" 3 Kent, 428*.

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no American resided there. The principal settlements were at the Kaskaskies, Prairie des Rochers, and Cahokia, the latter opposite Carondelet, and a little below St. Louis, though there were others, such as Fort Chartres, Prairie du Pont, and Cantine, the latter extending nearest to Wood River. Now, these donations, *one hundred acres*, were limited to exactly the quantity fixed by the law. It would have been most unjust to give one militia man one hundred acres, and to another, by possible accretion, one thousand acres.

It is to be presumed that the surveyors, under the direction of the governor of the Northwest Territory, carried out the directions of the law; that is, that they laid out said reservations in parallelograms. This being done, there was no possibility of making the river the boundary, except where, as in this case, as the maps show, accidentally the river-bank was quite straight and fell on the western line of the parallelogram, though it was not so straight but what one of the points of the survey was fixed in the river.

Now in the field-notes of survey 579, the tract in question, there is not a word said about meandering with the river, but all goes on points and *lines* clearly given. The field notes of the Coudaire tract are equally definite, and more significant; for while the eastern boundary, beginning on the Cahokia Creek, is made to run "*thence down the said creek with its different courses*," quite a different language is adopted as to the west boundary. It comes to *a point* on the bank of the Mississippi, but there is not a word said, as before, about going up the said river with "*its different courses.*" The language is "up the Mississippi, and binding therewith."

The west line of the Coudaire survey seems in fact to be identical with the west line of the three militia claims.

Both these land donations, militia claims and Coudaire settlement rights, were each a well-defined, measured tract of land.

Coudaire, whose right was younger than that under the militia claims, took nothing of these militia claims nor anything but the fractions east, between the lines of the militia claims and the meanders of the Cahokia Creek; the lower

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part on Diagram No. 8, and which is shaded. The title of the defendants to the land in question ultimately rests solely on the militia claims; the Coudaire grant being utterly void as to them.

There was no advantage of the river front when these locations were made. The country was hardly settled. St. Louis was a little village. The important point was Carondelet, on the Missouri side, six miles below. Canoes, and now and then a keel-boat, were the only craft on the river. No wharfage, no woodyards were thought of.

We have thus far argued the case strictly within the case in *Middleton* v. *Pritchard*,* and other decisions of the Supreme Court of Illinois, which are to the effect that all grants bounded upon a river *not navigable* (to which class they decide the Mississippi River to belong), as to riparian rights, entitle the grantee to claim to the centre thread of the river and all the islands lying between the main land and the centre thread of the current.

The doctrine that no rivers are navigable, except wherein ebb and tide flows, said to be the common-law doctrine, but denied even in England, is repudiated by many decisions in the State courts.†

In this court decisions have been made which strongly favor the view that the navigability of the river does depend on *navigation in fact*, and not on the supposed English definition.

If then the Mississippi is a navigable river, as to riparian rights, the accretions belong to the sovereign, and Congress had an undoubted right to grant them to the county of St. Clair.

Mr. W. H. Underwood, contra:

Every position taken by the opposing counsel is so well

* 3 Scammon, 510.

† Carson *v.* Blazer, 2 Binney, 475; Commonwealth *v.* Fisher, 1 Pennsylvania, 462; Wilson *v.* Forbes, 2 Devereux, 30; Cates *v.* Wadlington, 1 McCord, 580; Elder *v.* Burrus, 6 Humphreys, 358; Bullock *v.* Wilson, 2 Porter, 436; People *v.* Canal Appraisers, 33 New York, 461; McManus *v.* Carmichael, 3 Clark (Iowa), 1.

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answered in the opinion of Thornton, J., delivering the unanimous judgment of the court below, and every position which we would desire to enforce is so well there presented, that we do little but offer to this court his ideas in his own language.

If the land of the riparian proprietor was bounded by the Mississippi River, his right to the possession and enjoyment of the alluvion is not affected, whether the stream be navigable or not. By the common law, alluvion is the addition made to land by the washing of the sea, a navigable river, or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time. The navigability of the stream, as the term is used at common law, has no applicability whatever to this case. If commerce had been obstructed, or the public easement interrupted, or a question was to arise as to the ownership of the bed of the stream, then the inquiry as to whether the stream was navigable or not, in the sense of the common law, might be pertinent. No such question is presented. On this branch of the case the only question is: Have the United States, or has the State, or the riparian owner, the right to the accretion?

If the river is the boundary, the alluvion, as fast as it forms, becomes the property of the owner of the adjacent land to which it is attached. On a great public highway like the Mississippi, supporting an immense commerce and bearing it to every part of the globe, purchasers must have obtained lands for the beneficial use of the river as well as for the land. Can it be presumed that the United States would make grants of lands bordering upon this river, with its turbulent current, and subject to constant change in its banks by alluvion upon the one side and avulsions upon the other, and then claim all accretion formed by the gradual deposition of sand and soil, and deprive the grantee of his river front? If he should lose his entire grant by the washing of the river he must bear the loss, and he should be permitted to enjoy any gain which the ever-varying channel may bring to him. If a great government were to under

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take under such circumstances to dispossess its grantee of his river front, the attempt would be akin to fraud, and it would lose the respect to which beneficent laws and the protection of the citizen would entitle it.

Sir William Blackstone says* as to lands gained from the sea by alluvion, where the gain is by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For "*de minimis non curat lex;* and besides, these owners, being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss."

The same reasoning applies, with all its force, to the lands abutting upon the Mississippi River.

This question has been discussed with profound research and great ability by the courts in Louisiana, as to accretions upon this same river, and the law clearly announced. In *Municipality No.* 2 v. *Orleans Cotton Press*,† it was declared that the right to future alluvial formations was a right inherent in the property, an essential attribute of it, the result of natural law, in consequence of the local situation of the land; that cities, as well as individuals, had the right to acquire it, *jure alluvionis*, as riparian proprietor; and that the right was founded in justice, both on account of the risks to which the land was exposed and the burden of protecting the estate. The court further assimilated the right to the right of the owner of land to the fruits of a tree growing thereon.

The same principle was declared by this court in *Banks* v. *Ogden*.‡

The only portion of the field-notes to which we desire to call attention is the following:

"'To a post on the westerly side of the Cahokia Creek, thence down the creek with the different courses thereof,' and 'thence

* 2 Commentaries, 262. † 18 Louisiana, 122.

‡ 2 Wallace, 57; see, also, The Mayor, &c., of New Orleans v. The United States, 10 Peters, 662; Jones v. Soulard, 24 Howard, 41; Warren v. Chambers, 25 Arkansas, 120.

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N. 85° W. 174 poles, to a post on the bank of the Mississippi River; from which thence N. 5° E., up the Mississippi River and bounding therewith (passing the southwesterly corner of Nicholas Jarrot's survey No. 579, claim No. 99, at 6 poles), 551 poles and 10 links, to a post northwesterly corner of Nicholas Jarrot's survey No. —, claim No. 100.'"

This survey was made in 1815. From the copy of the plat of it, from the custodian of the United States surveys, it will be seen that the line along Cahokia Creek meanders with the stream, which was sinuous, and hence the call in the notes, "down the said creek, with the different courses thereof." A further examination of the plat will show that though the line from "a post on the bank of the Mississippi River to a post northwesterly corner of Nicholas Jarrot's survey, claim No. 100," is a straight line, the river-bank as indicated by the plat was also straight in 1815. The Coudaire survey embraces three militia claims which had been surveyed before, and which were confirmed to Jarrot.

One of the Jarrot surveys begins on the bank of the Mississippi, and thence to a point in the river, &c.

Concede that the Jarrot survey did not make the river the boundary by specific call, yet its beginning was *on the bank* of the river opposite St. Louis, and thence it followed the river to a point on it. It is, then, evident that at this time there was no land between the western line of the Jarrot survey and the river. All the plats introduced in evidence show that the river-bank was straight, and the point in the river must have been made for the purpose of obtaining the bearing of the witness tree, a sycamore 250 links from the point. It is manifest that the river was the boundary, and whether the grant was bounded by the river or on the river can make no difference as to the question involved. The grant may be so limited as not to carry it to the middle of the river, and yet not exclude the right to the alluvion.

The counsel for the county argue that a grant is not carried to the centre of a stream, but stops at the bank, if the grantor describes the line as upon the margin, or at the edge.

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or shore, and that these terms become monuments, and that they indicate an intention to stop at the edge or margin of the river. This may be good law, and not affect the rights of the defendants. They do not claim the bed of the stream, and the river does not run over the land in dispute at ordinary stages of water. Their claim, if established, does not obstruct the river, or interfere with its free navigation and use by the public.

But the Coudaire survey not only covers the Jarrot surveys, but extends beyond them. It not only takes any fractions between the Jarrot surveys and Cahokia Creek—the parts at the bottom of Diagram No. 3, and shaded—but the land, if any, between their western line and the river. The Coudaire survey ran up the river, *binding it*, and passed the southwesterly corner of the Jarrot survey, No. 579, at six poles. Language could not make it more plain, that the western line was bounded by the river; and the plats confirm this view.

The only construction to be given to these grants is, that the United States had conveyed the land to the bank of the Mississippi. It follows that the grantees were riparian proprietors, and are the owners of the alluvial formations attached to their lands.

Unless such construction be given and adhered to rigidly, almost endless litigation must ensue from the frequent changes in the current of the Mississippi and the continual deposits upon one or the other of its banks; the value of land upon its borders would depreciate, and the prosperity of its beautiful towns and cities would be seriously impaired.

Opposing counsel say that at the time the locations were made there was no advantage of river-front, no wharfage, and no wood-yards. This may be true, but even at this early period the grantees must have realized the vast importance of the Mississippi to them, and to all the people of the States bordering upon it, in the grand future soon to be unfolded. They must have seen the necessity, and accepted the grants, for the purpose of securing an approach to the river.

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Before 1819 a ferry was established across the river, near to the land in dispute, and has been since in constant operation. Before 1850 a city had sprung up on the Missouri side of the river, and a prosperous village was growing on the Illinois shore. Before 1852 a charter for a railroad had been granted by the State, which resulted in the construction of a road from Terre Haute, in the State of Indiana, to Illinoistown. Prior to the grant made by the United States in 1870, a number of railroad tracks had been constructed upon the ground formed by accretion, and an elevator erected, and dykes for the use of wagons, and a large expenditure of money made by the ferry company for the preservation of the banks recently made. These are matters of known public history.

It needed no prophetic eye to foresee, prior to the year 1850, these grand improvements which bring the products of an empire to the Father of Waters. Their absolute necessity, and consequent construction, as an outlet for our immense produce had been known for more than a quarter of a century before their completion. Their usefulness would be greatly crippled and the public thereby seriously suffer if ready access to the river was denied.

It would be a strained construction to hold that, in making these grants, the United States reserved all accretions, and thus to deprive these proprietors of ferry privileges and the beneficial enjoyment of the river.

It is further contended that the lands are not accretions, as they were made by artificial and not natural means.

Concede, what is not clear, that the dykes, to some extent, caused the accretions. They were not constructed for such purpose; and the defendants had nothing to do with their erection.

The fact that the labor of other persons changed the current of the river, and caused the deposit of alluvion upon the land of the defendants, cannot deprive them of a right to the newly made soil.

If portions of soil were added to real estate already pos-

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sessed by gradual deposition, through the operation of natural causes, or by slow and imperceptible accretion, the owner of the land to which the addition has been made has a perfect title to the addition. Upon no principle of reason or justice should he be deprived of accretions forced upon him by the labor of another, without his consent or connivance, and thus cut off from the benefits of his original proprietorship. If neither the State nor any other individual can divert the water from him, artificial structures, which cause deposits between the old and new bank, should not divest him of the use of the water. Otherwise ferry and wharf privileges might be utterly destroyed, and towns and cities, built with sole reference to the use and enjoyment of the river, might be entirely separated from it.

In *Godfrey* v. *The City of Alton*,* the public landing had been enlarged and extended into the river, both by natural and artificial means, and this court held that the accretions attached to and formed a part of the landing.

In *New Orleans* v. *The United States*,† the quay had been enlarged by levees constructed by the city, to prevent the inundation of the water, and the court held that this did not impair the rights of the city to the quay.

In *Jones* v. *Soulard*,‡ the intervening channel between the island and the Missouri shore had been filled up in consequence of dykes constructed by the city, and the riparian owner succeeded.

In the case at bar the accretions have not been sudden, but gradual, as we gather from the testimony. The city of St. Louis, to preserve its harbor and to prevent the channel from leaving the Missouri shore, threw rocks into the river, and the coal-dykes were made to afford access to boats engaged in carrying across the river. The ferry company protected such accretions by an expenditure of labor and money.

The accretions are partly the result of natural causes and partly of structures and work erected and performed for the

* 12 Illinois 29. † 10 Peters, 662. ‡ 24 Howard, 41.

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good of the public. The defendants should not thereby lose their frontage on the river, and be debarred of valuable rights heretofore enjoyed. This would be a grievous wrong, for which there would be no adequate redress.

Mr. Justice SWAYNE delivered the opinion of the court.

We shall assume, for the purposes of this opinion, that all the title which could be passed by Congress and the State was and is vested in the plaintiff in error.

It is not denied, on the other hand, that a valid title to the surveys 579 and 786 is vested in those under whom the defendant in error holds.

Two questions are thus presented for our determination:

One is, whether the river-line was the original west boundary of the surveys, or either of them?

The other, if this inquiry be answered in the affirmative, is to whom the accretion belongs?

The first is a mixed question of law and fact. The second is a question of law.

Before entering upon the examination of the first of these questions, it may be well to advert to a few of the leading authorities apposite to this phase of the case.

It is a universal rule that course and distance yield to natural and ascertained objects.* A call for a natural object, as a river, a spring, or even a marked line, will control both course and distance.†

Artificial and natural objects called for, have the same effect.‡

In a case of doubtful construction, the claim of the party in actual possession ought to be maintained, especially where it has been upheld by the decision of the State tribunals.§

In *Bruce* v. *Taylor*,‖ a patent called "to begin on the Ohio

* Preston's Heirs v. Bowmar, 6 Wheaton, 580.

† Newsom v. Pryor's Lessee, 7 Id. 7.

‡ Barclay and others v. Howell's Lessee, 6 Peters, 499; Baxter v. Evett's Lessee, 7 Monroe, 333.

§ Preston's Heirs v. Bowmar, *supra*.

‖ 2 J. J. Marshall, 160.

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River, and then for certain courses and distances, without any corners or marked lines, to the mouth of the Kennikek, and then certain courses and distances, without any courses or marked lines, to a stake in the Ohio River." If the river was the boundary, the land in controversy was within the patent. If the courses and distances prevailed, the patent did not affect it. The court said: "It is our opinion that the river is the boundary." It was added: "Two of the calls are on the river. There are no intermediate marked lines or corners. The general description is, 'to lie on the Ohio.' These facts alone would not leave room for any other construction of the patent." This case is very instructive, and contains much additional argument in support of the view expressed. *Cockrell* v. *McQuinn*,* is to the same effect. In the latter case the court said: "None will pretend that the legal construction of a patent is not a matter proper for the decision of the court whose province it is to decide all questions of law." In *Bruce* v. *Morgan*,† the rule laid down in *Bruce* v. *Taylor* was affirmed.

Where a survey and patent show a river to be one of the boundaries of the tract, it is a legal deduction that there is no vacant land left for appropriation between the river and the river boundary of such tract.‡

Where a deed calls for a corner standing on the bank of a creek, "thence down said creek with the meanders thereof," the boundary is low-water mark.§

Where a deed calls for an object on the bank of a stream, "thence south, thence east, thence north to the bank of the stream, and with the course of the bank to the place of beginning," the stream at low-water mark is the boundary.‖

Where the line around the land was described as "running to a stake at the river, thence on the river N. 6° 40′ 23 perches, thence N. 39° 50′ W. 33 perches, thence N. 20° 20′,

* 4 Monroe, 62. † 1 B. Monroe, 26. ‡ Churchill v. Grundy, 5 Dana, 100.

§ McCullock's Lessee v. Aten, 2 Ohio, 309; see, also, Handly's Lessee v. Anthony, 5 Wheaton, 380.

‖ Lamb v. Rickets, 11 Ohio, 311.

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85 perches and 8 links to a stake by the river," it was held that this description made the river a boundary.*

Where premises above tide-water are described as bounded by a monument standing on the bank of the river, and a course is given as running from it down the river as it winds and turns to another monument, the grantee takes *usque filium aquæ*, unless the river be expressly excluded from the grant by the terms of the deed.†

The eastern line of the city of St. Louis, as it was incorporated in 1807, is as follows: "From the Sugar Loaf east to the Mississippi, from thence by the Mississippi to the place first mentioned." This court held that the call made the city a riparian proprietor upon the river.‡ It was said in this connection that "many authorities resting on adjudged cases have been adduced to us in the printed argument, presented by the counsel for the defendant in error, to show that, from the days of Sir Matthew Hale to the present time, all grants of land bounded on fresh-water rivers, where the expressions designating the water-line are general, confer proprietorship on the grantee to the middle of the stream, and entitle him to the accretions. We think this, as a general rule, too well settled, as part of the English and American law of real property, to be open to discussion."

It may be considered a canon in American jurisprudence, that where the calls in a conveyance of land, are for two corners at, in, or on a stream or its bank, and there is an intermediate line extending from one such corner to the other, the stream is the boundary, unless there is something which excludes the operation of this rule by showing that the intention of the parties was otherwise. Whether in the present case the limit of the land was low-water, or the middle thread of the river, is a question which does not

* Rix v. Johnson, 5 New Hampshire, 520.

† Luce v. Carley, 24 Wendell, 451.

‡ Jones v. Soulard, 24 Howard, 44; see, also, Schurmeier v. St. Paul and Pacific Railroad, 10 Minnesota, 330, and Shelton et al. v. Maupin, 16 Missouri, 124.

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arise, and to which we have given no consideration. The point was considered by this court in *Railroad* v. *Schurmier*.*

Survey 579 is the elder one. Its calls are: "Beginning on the *bank of the Mississippi River*, opposite to St. Louis, from which the lower window of the United States storehouse in St. Louis bears N. 70¾ W.; thence S. 5 west 160 poles to a *point in the river* from which a sycamore 20 inches in diameter bears S. 85 E. 250 links, thence S. 85 E. 130 poles (at 30 poles a slash) to a point; thence N. 15 W. 170 poles to a forked elm on the bank of Cahokia Creek; thence N. 85 W. 70 poles to the beginning."

It will be observed that the beginning corner is on the bank of the river. The second corner is a point in the river. The line between them is a straight one. Where the course as described would have fixed the line does not appear.

There was an obvious benefit in having the entire front of the land extend to the water's edge. There was no previous survey or ownership by another to prevent this from being done. No sensible reason can be imagined for having the two corners on the river, and the intermediate line deflect from it. Under the circumstances we cannot doubt that the river was intended to be made, and was made, the west line of the survey. In the light of the facts such is our construction of the calls of the survey, and we give them that effect.

The calls of survey No. 786, as respects this subject, are: "Thence N. 85° W. 174 poles, to a post *on the bank of the Mississippi River, from which . . . ; thence N. 5° E. up the Mississippi River and binding therewith* (passing the southwesterly corner of Nicholas Jarrot's survey, No. 579, claim No. 99, at 6 poles), 551 poles and 10 links, to a post northwesterly corner of Nicholas Jarrot's survey, No. —, claim No. 100, from which a sycamore 36 inches diameter bears S. 21° W. 29 links; thence S. 85° E. with the upper line of the last-mentioned survey 88 poles to the beginning."

Here the calls as to the river are more explicit than in

* 7 Wallace, 287.

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survey No. 579. The language "up the Mississippi River and binding thereon," leaves no room for doubt. Discussion is unnecessary. It could not make the result clearer. The river must be held to have been the west boundary of this survey also.

In reaching these views we pervert no principle of law or justice. Our conclusions are sustained by authority and reason.

This brings us to the consideration of the second question.

It is insisted by the learned counsel for the plaintiff in error that the accretion was caused wholly by obstructions placed in the river above, and that hence the rules upon the subject of alluvion do not apply. If the fact be so, the consequence does not follow. There is no warrant for the proposition. The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural or affected by artificial means is immaterial.*

The law in cases of alluvion is well settled.

In the Institutes of Justinian it is said: "Moreover, the alluvial soil added by a river to your land becomes yours by the law of nations. Alluvion is an imperceptible increase, and that is added by alluvion which is added so gradually that no one can perceive how much is added at any one moment of time."†

The surveys here in question were not within the category of the *agri limitati* of the civil law. The latter were lands belonging to the state by right of conquest and granted or sold in plats. The increase by alluvion in such cases did not belong to the owner of the adjoining plat.‡

The Code Napoleon declares:

"Accumulations and increase of mud formed successively and imperceptibly on the soil bordering on a river or other

* Halsey v. McCormick, 18 New York, 147; 3 Washburne on Real Property, 58, 353*.

† Lib. II, Tit. I, § 20.

‡ D. XLI, 1, 16; Sanders's Institutes, 177; see, also, Morgan v. Livingston, 6 Martin's Louisiana, 251.

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stream is denominated 'alluvion.' Alluvion is for the benefit of the proprietor of the shore, whether in respect of a river, a navigable stream, or one admitting floats or not; on the condition, in the first place, of leaving a landing-place or towing path conformably to regulations."*

Such was the law of France before the Code Napoleon was adopted.†

And such was the law of Spain.‡

Blackstone thus lays down the rule of the common law:

"And as to lands gained from the sea, either by alluvion, by the washing up of land and earth, so as in time to make terra firma, or by dereliction, as when the sea shrinks below the usual water-marks; in these cases the law is held to be that if the gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. For *de minimis non curat lex;* and besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is, therefore, a reciprocal consideration for such possible charge or loss. But if the alluvion be sudden or considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry."§

Blackstone takes his definition from Bracton, lib. 2, chap. 2. Bracton was a judge in the reign of Henry III, and the greatest authority of his time. Hale, in his *De Jure Maris*, says Bracton followed the civil law. Hale himself shows the great antiquity of the rule in the English law.‖

Chancellor Kent, the American commentator, recognizes the rule as it is laid down by the English authorities referred to.¶

* Book II, of Property, &c., § 556.

† 4 Nouveau Dictionnaire de Brillon, 278; Morgan v. Livingston et al., 6 Martin, 243.

‡ Partid. iii, tit. xxviii, Law 26.

§ 2 Commentaries, 262; see, also, Woolwich's Law of Waters, 84; and Shultes's Aquatic Rights, 116.

‖ De Jure Maris, 1st pt, ch. 6; see, also, The King v. Lord Yarborough, 1 Dow & Clark, Appeal Cases, 287. ¶ 3 Commentaries, 428.

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By the American Revolution the people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them.* The shores of navigable waters and the soil under them were not granted by the Constitution to the United States, but were reserved to the States respectively. And new States have the same rights of sovereignty and jurisdiction over this subject as the original ones.†

The question here under consideration is not a new one in this court. In *New Orleans* v. *The United States*,‡ it was said: "The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain."

To the same effect are *Saulet* v. *Shepherd*,§ and *Schools* v. *Risley*.‖

In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property.

* Martin v. Waddell, 16 Peters, 367; Russel v. The Jersey Co, 15 Howard, 426.

† Pollard's Lessee v. Hagan et al., 3 Howard, 212; Pollard v. Kibbe, 9 Id. 471; Hallett v. Bute, 18 Id. 25; Withers v. Buckley, 20 Id. 84.

‡ 10 Peters, 662. § 4 Wallace, 502. ‖ 10 Id. 110.

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Syllabus.

The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim "*qui sentit onus debet sentire commodum*" lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. The principle applies alike to streams that do, and to those that do not overflow their banks, and where dykes and other defences are, and where they are not, necessary to keep the water within its proper limits.*

In England the rule which is applied to gradual accretions on the shores of fresh waters is applied also to such accretions on the shores of the sea.†

We may well hold that the adjudications of this court to which we have referred are decisive of the case before us. They are binding upon us as authority. We are of the opinion that the United States never had any title to the premises in controversy, and that nothing passed by the several acts of Congress and of the legislature of Illinois, relied upon by the plaintiff in error.

JUDGMENTS AFFIRMED.

THE DEXTER.

1. **The rule of navigation prescribed by the act of Congress of April 29th, 1864, "for preventing collisions on the water," which requires "when sailing-ships are meeting end on, or nearly so, the helms of both shall be put to port," is obligatory from the time that necessity for precaution begins, and continues to be applicable so long as the means and opportunity to avoid the danger remain.**

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* 3 Washburne on Real Property, 58, *452; Municipality No. 2 v. Orleans Cotton Press, 18 Louisiana Rep. 122.

† The King v. Lord Yarborough, 3 Dow & Clark's Appeal Cases, 178.

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Statement of the case.

2. In a collision at sea, happening on a bright moonlight night, and when the approaching vessel was seen by the officer in charge of the deck long before the collision occurred, the absence of a lookout *held* unimportant; it being assumed that his presence would have done nothing to avert the catastrophe.

APPEAL from the Circuit Court for the District of Maryland, affirming a decree of the District Court dismissing a libel filed by the owners of the schooner Julia against another schooner, the Dexter, in a cause of collision in Chesapeake Bay, by which the Julia was totally lost; the only difficulty in the controversy being—that usual one in causes of collision at sea—to ascertain what were the facts of the case; in other words, to settle the case; a matter rendered difficult in this cause, as in so many others of collision, by the circumstance that witnesses of one side swore in direct opposition to witnesses of the other. The adjudication, therefore, ministers nothing to juridical science.

The case, as it was assumed in both the courts below, and in this, upon the contradictory testimony adverted to, was thus:

On the night of November 17th, 1870—the night being clear and the moon shining brightly—the schooner Julia was sailing up Chesapeake Bay. The schooner Dexter was sailing down it. The wind, which was fresh, was between northwest and west-by-north, and the vessels were each sailing at the rate of eight miles an hour; approaching, therefore, rapidly. The Julia was close to the wind, though not as close as she would lie without impeding her course.

The helmsmen of the two vessels saw them respectively when three miles from each other. What their exact course *then* was, and whether likely to come together did not so plainly appear. Some evidence tended to show that, at *that* time, the vessels were not approaching end on, but that the Dexter was sailing with the wind free. But by the time that they got to within a half-mile of each other the Julia was heading north-northeast, and the Dexter south-southwest; that is to say, the vessels were approaching from exactly opposite directions; and the vessels were approaching also

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end on, or nearly so. As they thus approached the Dexter ported her helm. The Julia kept on her course, till the vessels got very near, when a collision was plainly threatened. The Julia then starboarded her helm. A collision ensued, and the Julia, which was heavily laden with oysters, went to the bottom.

The only lookout on the Dexter when the Julia came in sight was the captain, who, at the time of the collision, was standing aft of the foremast.

The act of Congress "fixing certain rules and regulations for preventing collisions on the water," among its "Steering and Sailing Rules" thus provides:*

TWO SAILING-SHIPS MEETING.

"ARTICLE 11. If two sailing-ships are meeting end on, or nearly end on, so as to involve risk of collision, the helms of both shall be put to port, so that each may pass to the port side of the other."

TWO SAILING-SHIPS CROSSING.

"ARTICLE 12. When two sailing-ships are crossing, so as to involve risk of collision, then if they have the wind on different sides, the ship with the wind on the port side shall keep out of the way of the ship with the wind on the starboard side, except in the case in which the ship with the wind on the port side is closehauled, and the other ship free; in which case the latter ship shall keep out of the way. But if they have the wind on the same side, or if one of them has the wind aft, the ship which is to windward shall keep out of the way of the ship which is to leeward."

NO SHIP, UNDER ANY CIRCUMSTANCES, TO NEGLECT PROPER PRECAUTIONS.

"ARTICLE 20. Nothing in these rules shall exonerate any ship, or the owner, or master, or crew thereof, from the consequences of any neglect to carry lights or signals, or *of any neglect to keep a proper lookout*," &c.

The District Court, as already said, decreed a dismissal

* 13 Stat. at Large, 60.

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of the libel; the Circuit Court affirmed the decree, and the owner of the Julia took this appeal.

Mr. R. F. Brent, for the appellant, owner of the Julia, contended—

1. That the captain was not a competent lookout, and that if he had been so in general, he was standing on this occasion aft of the foremast, and plainly could not see; that Article 20 of the act of Congress is obligatory on vessels to keep *a proper lookout*, and that none of the other rules which the act prescribed dispensed with the obligation to do so.*

2. That this was not a case under Article 11th of the Rules to Avoid Collisions; a matter which the learned counsel attempted to establish by the evidence; arguing that the theory of the Dexter, that the vessels were approaching each other "end on," was based on evidence not trustworthy; that the Dexter, at the distance of two miles, must have been upon the course diverging to the westward and approaching the Julia, not only to the leeward as respected place, but also heading on a course bearing to the eastward of the Julia's course; and that so she was not meeting end on, but was a vessel sailing with the wind free, and subject to Article 12th; that the rules of navigation begin to apply when vessels are within ten or twelve minutes of each other; that hence the Dexter should not have put the Julia in jeopardy, or even in a reasonable fear of danger; that a vessel with the wind free should give a wide berth to one having the right of way;† that porting the helm a point or so, and then waiting (as did the Dexter) until the collision was inevitable, was not enough to exonerate one whose duty it was to give way;‡ that the Julia was closehauled and never changed her course until the collision was imminent; that a vessel with the right of way should keep her course; and that if there was error on the Julia's part in the moment

* The Hypodame, 6 Wallace, 224; The Ottawa, 8 Id. 268.

† Bentley v. Coyne, 4 Wallace, 509.

‡ The Shakspeare, 4 Benedict, 129; The Carroll, 8 Wallace, 302.

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of collision, such error would not prevent her from recovering if otherwise not in fault.*

Messrs. S. T. Wallis and J. H. Thomas, contra:

The case is one really involving nothing but fact; and on the evidence the facts are plain. Two courts have found them in one way. In such a case the findings are *primâ facie* right. On the case then as found, the matter is too palpably plain for argument. The following points will occur at once, to every one, and they end all question:

1. When the vessels were half a mile apart, the Dexter saw the Julia. They were "meeting end on, or nearly end on," and under article eleven of the act of Congress the helms of both should have been put to port, so that each could pass on the port side of the other.†

2. They were not "crossing" within the meaning of the twelfth article. That section is applicable to two vessels on different and converging tacks.

3. The Dexter ported her helm when far enough off to pass safely on either side of the Julia. This was a full compliance with her obligations under either rule.

4. The Julia starboarded her helm. If the eleventh rule was applicable, she ought to have ported; if the twelfth, she ought to have kept her course. She violated her duty under either rule.

5. It is unimportant, in view of the facts of this case, under either of these rules, whether the Julia was closehauled or not. There was nothing to prevent her from porting, going farther to leeward, if that was her duty, or from keeping her course, if subject to the twelfth rule. If she had done either there would have been no collision.

6. The case as proved shows that the Julia was not closehauled.

7. The error on the part of the Julia was not excusable on the ground of well-founded alarm arising from too dan-

* Bentley v. Coyne, 4 Wallace, 509.

† The Nichols, 7 Wallace, 656.

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gerous proximity, the result of previous fault on the part of the Dexter.

8. The absence of a special lookout other than the captain on the Dexter could not have contributed to the collision. Her captain saw the Julia two miles off; saw all that could be seen, and did everything that could have been done under any circumstances.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Objection is made by the libellant that the lookout of the Dexter was insufficient, but it is unnecessary to decide the question, as it was a clear night, and as each vessel was seen by the other long before there was any necessity for precaution and in ample time before the collision to have done whatever the circumstances required to have prevented the disaster. Sufficient lookouts are required by the rules of navigation, but where it appears that the officer in charge of the deck saw the approaching vessel while she was yet so distant that no precautions to avoid a collision had become necessary, and that the want of a lookout did not and could not have contributed to the collision, the vessel omitting such a proper precaution will not be held responsible for the consequences of the disaster if in all other respects she is without fault.†

It is insisted by the libellant that the wind was from the northwest and that his schooner was closehauled. On the other hand, it is contended by the claimant that the wind was west-by-north, and he denies that the course of the schooner was such as is alleged by the libellant.

Strong doubts arise whether the wind was as far north as the point assumed by the libellant, and the proofs fail to convince the court that it was as far to the west as is supposed by the claimant. Difficulties attend the inquiry, but the better opinion is that the course of the schooner of the libellant was not as close to the wind as she would lay, without impeding her headway. Nor is it very material whether

* The Farragut, 10 Wallace, 337. † Ib. 337.

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she was or not when the vessels were first seen by each other, as they were then two miles apart and were moving through the water, by estimation, at the rate of fourteen or fifteen miles an hour. Satisfactory proof is exhibited that the schooner of the claimant was heading south-southwest, and whatever may have been the course of the other schooner when they were two miles apart, the proof is equally satisfactory that her course when they were a half a mile apart was exactly opposite to that of the schooner of the claimant. Evidence is certainly exhibited in the record tending to show that the course of the schooner of the libellants was east-northeast when the vessels were first seen by each other, but it is convincing that when they were only a half-mile apart they were approaching from exactly opposite directions and that the case falls within the true intent and meaning of the eleventh sailing rule prescribed by Congress.

Sailing ships are meeting end on, within the meaning of that provision, when they are approaching each other from the opposite directions or on such parallel lines as involve risk of collision on account of their proximity, and when the vessels have advanced so near to each other that the necessity for precaution to prevent such a disaster begins, which cannot be definitely defined, as it must always depend, to a certain extent, upon the speed of the respective vessels and the circumstances of the occasion.*

Rules of navigation, such as the one mentioned, are obligatory upon vessels approaching each other from the time the necessity for precaution begins and continue to be applicable as the vessels advance so long as the means and opportunity to avoid the danger remain. They do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description while they are yet so distant from each other that measures of precaution have not become necessary to avoid a collision.

Apply the eleventh sailing-rule to the case and it is clear

* The Nichols, 7 Wallace, 664.

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that the decree of the Circuit Court should be affirmed, as the evidence shows that the two vessels when they were half a mile apart were approaching each other in opposite directions and that the schooner of the claimant ported her helm as required by that rule; and it is equally clear that the collision would have been prevented if the schooner of the libellant had performed her duty in that regard. Instead of that she held her course until the danger became imminent, and then, by the mistake of the man at the wheel, put her helm in the wrong direction, which rendered the collision inevitable.

Attempt is made in argument to exculpate the error of the helmsman upon the ground that the danger was imminent, but such an excuse cannot be admitted as a valid one where it appears that the imminence of the peril was occasioned by the negligence, carelessness, or unskilfulness of those in charge of the vessel setting up such an apology for a violation of a plain rule of navigation.

Serious conflict exists in the testimony as to what was done by the respective vessels when they were more distant from each other, but it is not deemed necessary to give that part of the evidence much examination, as it is clear that they had ample time and opportunity to adopt every needful precaution to avoid a collision after it must have been apparent to both that they were fast approaching each other from opposite directions.

Resort is had by the libellant to that part of the evidence to show that the case falls under the twelfth sailing-rule and not under the eleventh, as contended by the claimant. Even suppose that proposition could be maintained, which is denied, it is quite clear that it would not benefit the libellant, as it is conceded that his schooner changed her course by putting her helm to starboard and that it was that error which produced the collision.

Viewed in any light it is clear that the libellant is not entitled to recover.

DECREE AFFIRMED.

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THE TEUTONIA.

Two steam vessels, one an iron steamship (an ocean vessel of twenty-five hundred tons), coming from sea up the Mississippi to New Orleans, and the other a small river steamer of one hundred and thirty-five tons, trading up and down the river below New Orleans from plantation to plantation, and carrying passengers, and getting market produce for the city just named, *held*, in a case of collision, to be equally in fault for running at full speed in a very dark and foggy night, after they had learned by signals from each other of their respective existences in the river, and while they were in doubt as to what respectively were their courses and manœuvres.

APPEAL from the Circuit Court for the District of Louisiana; the case being thus:

On the night of December 30th, 1868, the iron steamship Teutonia, an ocean vessel of twenty-five hundred tons burden, then arriving by sea from Hamburg, entered the mouth of the Mississippi, meaning to go up it that night to New Orleans. She arrived at the quarantine below the city at 8¾ o'clock P.M. The night was dark and the weather very foggy. By 10 o'clock the fog had partially cleared away, and the vessel left the quarantine and proceeded up the river on her course to New Orleans. In an hour or so, and by the time that she was approaching Point la Hache, which is forty-five miles below New Orleans, the fog had increased and there was considerable rain and wind. The night, too, continued very dark.

On the same evening, the Brown, a small river steamer of one hundred and thirty-five tons, carrying passengers and market produce on the river between New Orleans and the various plantations on both sides of it below—touching first at one and then at the other, delivering or receiving cargo, and in the habit of running day and night without much regard to weather—set off from New Orleans on one of her customary trips. By 11 o'clock she, too, was nearing Point la Hache. As she approached the Point, having then just left Woodville Landing, she blew three long whistles, an in-

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dication simply that a steamer was descending the river. Two short whistles were heard in reply from below. These were from the ascending steamship, and they signified that *that* vessel would go to the left bank. The steamer, whose business required her now to touch on that side, also blew two whistles in response, indicating that *she* intended to go on that side, to which indeed she was now rapidly crossing. No reply coming back from the steamship, the steamer repeated the signal, and in return the steamship blew a single whistle, to indicate that things were understood and that *she* would go to the *right* bank. Thus far there was no difficulty about the case. But the vessels unexpectedly and of a sudden found themselves in close proximity to one another. What now took place, as they thus came near each other—this being the important part of the case—was a matter about which the parties on one vessel swore in one way and those on the other swore in another and exactly opposite way. Whistles, perhaps, were blown on both vessels, but if so they were misinterpreted in the confusion of the moment, and it was plain that while the vessels were rapidly approaching, they were, both from the darkness and fogginess of the night, unconscious how near they were to each other, what were their relative positions, and what their respective purposes as to course and manœuvre.

The result of the whole was that while the owners of each vessel brought witnesses from his own vessel who swore that the engines of *that* vessel were seasonably stopped and reversed, the two vessels themselves collided with a violence impossible to have existed had this been done; and that the smaller one, the steamer, whose witnesses testified that the steamship had attempted to go between her and the left or eastern shore, went over, and so, bottom upmost, sank in the depths of the stream, here thirty-five feet deep. In this position a submarine diver, brought by her owners, testified that fourteen months after the catastrophe he examined her and "that he found a hole in her starboard side three feet and two inches in length, and four feet in depth, twenty-five feet aft the stem, and that the hole went clear through the

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side of the vessel into the hull, and that the planks were started off on the opposite or port side."

Her value was $9000, and she was insured in $3000.

Her owners now libelled the steamship in the District Court at New Orleans. The libel alleged that the pilot of their steamer first stopped and then reversed her engines, and seeing that the steamship was crossing the river and approaching the steamer, hallooed to those on the deck of the approaching steamship that she would run into his steamer; that those in charge of the steamship paid no attention to this warning, but suffered the steamship to come on with a full head of steam, striking the steamer on the starboard side, making a large hole in her hull and causing her to go down.

The answer alleged contrariwise, that the pilot of the steamship, when he discovered the approach of the steamer of the libellants, ordered the helm of the steamship to be put hard-a-port; that the order was immediately executed; that the approaching steamer nevertheless kept on her course and ran with great force and violence afoul of the steamship, striking her on the *port side*, about one hundred and fifteen feet from the stern.

The District Court, at the request of the owners of the steamship, who alleged that the case involved nautical questions which no one but shipmasters could properly decide, invited two persons having experience both as masters and pilots to sit as its assessors. The assessors sat and heard both evidence and arguments. The aid rendered to the court by them, however, did not prove of great value; for while each assessor gave an opinion, and each fortified his opinion with numerous reasons to show its correctness, the conclusion reached by one was the exact reverse of the conclusion reached by the other. The court accordingly decided the case for itself, deciding that the collision was caused by the carelessness of the steamship, and that she and she alone was in fault.

From this decree the case was taken to the Circuit Court, which, disagreeing with the District Court, thought that the

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steamer alone was to blame, and accordingly dismissed the libel with costs in both courts.

From that decree of reversal the case was now here.

Messrs. Durant and Hornor, for the owners of the steamer, appellants:

1. The steamer was one of one hundred and thirty-five tons, engaged in trade on the Mississippi River, between the city of New Orleans and the plantations below, stopping on her way down at the various plantations on both sides of the river, landing supplies and passengers; and on her way up conveying to the city, passengers and the produce of the plantations. She was a regular "coast packet," as such boats are called, plying on the river between the city and the plantations, and running day and night, in all sorts of weather; and was in fact as much of a necessity for the planters and agriculturalists of that section as the Brooklyn ferries are for those of Long Island.

The actual value of the steamer was $9000; she was insured for $3000. In view of this fact we start with the presumption in our favor that the steamer was under the management of men deeply interested in avoiding a collision.

The other vessel was an ocean iron steamship of over twenty-five hundred tons burden. She was, therefore, very nearly *twenty times* the tonnage of our steamer.

The night was a winter night, very dark and foggy; it was blowing and raining. No dispute exists as to the facts above stated. And on this indisputable case our first point is that the steamer was properly engaged in her usual business, had the right to cross and recross the river, and was not bound to "lay up;" and that on the contrary, the steamship was in fault in ascending the river at the time and under the circumstance that she did; that by so doing she very greatly and unnecessarily enhanced the perils of the river to the river steamers, and that it was *her* duty to "lay up" for the night, either at the quarantine station, whence she had set off, or at Point la Hache. She could gain nothing by going up to New Orleans that evening, for she would arrive there long before daylight.

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2. If she was not bound to lay up she was assuredly bound, on such a night as this was, dark and foggy, when running at all, to run at a slow rate of speed; and upon the very first signal of a vessel above, to run with the most extreme caution and vigilance. As we have said, she was an immense iron ocean steamship, nearly twenty times the size of our wooden steamer. Our steamer might have run at full speed and have struck her and yet have done *her* no harm. *She* could not be going at her full speed and strike us at all, and not destroy us. If, therefore, we had been going at full speed (which we assert that we were not doing at the time), the catastrophe would not have occurred had the steamship been going at a properly reduced rate of speed, and had she been stopped. The force of any blow in such a case is in proportion to the *mass* and the momentum.

3. The probabilities, independently of the evidence, would be against the steamship. A man in absolute command and control of a very large vessel, an ocean steamship freighted with the wealth of the world, is far too apt, unless he be rather nobly constituted, to look down with some indifference upon all smaller craft. In a natural idea of his own importance he feels: "I have signalled that I am coming. Lookout for yourselves." But this idea, however natural, is one wholly illegal. Contrary to what it prompts, the pilot of the large vessel should respect the small one simply because it *is* small, because it *is* weak, because a collision which will do no harm at all to the large one will destroy the small one in a moment, and send it, as was the case here, bottom upwards, and almost in an instant, to destruction.

Mr. P. Phillips, contra, for the owners of the steamship:

1. The opposing counsel assume that the steamboat was a *privileged* vessel, and because she brought vegetables, &c., to the markets of New Orleans, that therefore she had a right to the road as against the largest vessels that cross the ocean; vessels "freighted with the wealth of the world." We deny this extensive right. The river packet-boat had

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no more right than the steamship had to be in the river. If the night was so dark and the weather so misty as to make navigation dangerous, *she* was bound to stop as much or more than the steamship, for she was continually leaving the natural line of travel up and down the river, and crossing and recrossing from side to side; an operation of necessity dangerous, and one which in this case led to the catastrophe. To stop and detain for twelve hours a great ocean steamship, laden with passengers, is a costly, difficult, injurious, and (when as here the ship is almost in port) a vexatious thing to do. To stop and detain a river packet-boat is a small affair; neither costly, difficult, injurious, nor vexatious.

When the steamship left the quarantine, the weather was favorable for going up the river, unless the fog rose again, of which, at that time, there was no prospect.

It was not the same thing to the steamship whether she remained all night down at quarantine or not. She wished to be at New Orleans by daylight of the 31st December, ready with the morning to send her passengers ashore and to unload her cargo. The 1st of January would be a holiday.

2. The steamship is admitted to have been well manned, to have had proper lookouts, and proper lights in their proper places burning brightly. The officers and hands on our large ocean steamships, such as was this one, are habitually careful as to lights, lookouts, and other matters pertaining to vigilance.

There is great conflict of evidence about certain facts; the court must pass upon the weight of the evidence; but, as *we* read it, it shows that the rules of navigation were strictly complied with by the steamship; that she was sailing at the time of the catastrophe at a reduced rate of speed, and upon the first intimation of real danger, that she first slowed, and then stopped her engines and put her helm a-port.

In conclusion, there is no pretence that the collision was *wilful* on the part of the steamship. The collision was therefore *accidental*, and whether the accident is to be attributed

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to the want of diligence or skill in those who controlled the ship, is the question to be solved, in considering whether the decree below should be affirmed or reversed. We see no evidence of want of skill on the steamship.

Whatever may be the rule elsewhere, it is the settled doctrine of this court, that where a collision occurs without the negligence or fault of either party, each should bear his own loss.* But if this be not so, this court will, at the most, reverse the decree in order to divide the damages. It cannot reverse to establish the view of the District Court, and to hold the steamship alone responsible.

Mr. Justice CLIFFORD delivered the opinion of the court, in effect as follows:

The pleadings and proofs sufficiently show that the approaching vessels were respectively ignorant of each other's intention as to the course they would pursue; that nothing was done by the officers and crew of the steamer which could enable those in charge of the steamship to ascertain or determine what course the steamer intended to pursue, and that those in charge of the steamer were equally in doubt and uncertainty as to what were the intentions of the steamship.

The collision occurred between eleven and twelve o'clock at night. The night was dark. Both vessels were in a pretty dense fog just prior to the collision, and inasmuch as they had failed to come to an understanding from the signals given as to what precautions would be necessary to avoid a collision, it was manifest rashness to advance until they could in some way accomplish that object. This is virtually admitted by both parties, as each alleges that they stopped their engines, though it is not possible to credit the statements that they did so, as it is clear that if such orders had been given by both parties and seasonably and effectually executed, the collision would have been avoided. The circumstances disclosed in the testimony satisfy the court

* Stainback v. Rae et al., 14 Howard, 532.

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that both vessels were under headway when the collision occurred. The contradictory allegations in the libel and answer cannot be reconciled, nor is there anything in the testimony to afford much aid in that direction.

Great reliance to support the theory that the steamship struck the steamer upon the starboard side is placed by the libellants upon the testimony of a witness employed by them to examine the wrecked steamer some fourteen months after the collision. But the argument for the appellees is that such a theory cannot be supported, as the steamer of the libellants was bound down the river, and it must be admitted that the argument is entitled to weight. Still it is not difficult to see that it may be true if the residue of the libellants' theory is well founded, that the steamship actually attempted to pass up the river between the steamer of the libellants and the eastern shore of the river, as the testimony of the libellants tends strongly to prove.

Inconsistencies, however, such as these cannot be reconciled with any satisfactory degree of certainty, nor is it necessary to make any such attempt in the case before the court, since, as already said, it is clear in the judgment of the court, that both vessels were under considerable headway when the collision occurred. Those in charge of each of them knew that the other was approaching from the opposite direction, and that their efforts to come to an understanding as to the respective courses they should pursue had been unsuccessful; and they also knew that the night was dark and foggy to such an extent as to render navigation peculiarly dangerous.

Attempt is not made to set up the defence of inevitable accident, nor could it have been successful if it had been set up, as such a defence can only be maintained in a case where neither vessel is in fault. Inevitable accident in the case of a collision is where both parties have endeavored by all means in their power, with due care and a proper display of nautical skill, to prevent its occurrence, or it may result from the darkness of the night if it clearly appears that both parties were without fault from the time the necessity for

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precaution began to the moment when every opportunity to avoid the danger ceased.

Precautions must be seasonable in order to be effectual, and if they are not so and a collision ensues in consequence of the delay, it is no defence to allege and prove that nothing could be done at the moment to prevent the disaster, or to allege and prove that the necessity for precautionary measures was not perceived until it was too late to render them availing. Inability to avoid a collision usually exists at the moment it occurs, but it is generally an easy matter, as in this case, to trace the cause to some antecedent omission of duty on the part of one or both of the colliding vessels. Plainly both were in fault in this case in that they continued to advance under headway in a dark night, when those in charge of them knew that there was imminent danger that they would collide. Both vessels having been in fault the rule is that the damages should be divided between the offending vessels.

DECREE REVERSED, with costs in this court, and the cause is REMANDED with directions to divide the damages found in the District Court, together with the costs in both of the subordinate courts.

REVERSAL AND REMAND ACCORDINGLY.

INSURANCE COMPANY *v.* YOUNG'S ADMINISTRATOR.

A., of San Francisco, aged twenty-six, applied, on the 5th of June, 1867, to the agent there of a New York life insurance company to insure his life, the money to be payable "at forty-five, or death," and the policy to take effect from date of the application. The agent acknowledged the receipt of $99.80 as the first quarterly premium, with a proviso that "said application shall be accepted by the company; but should the same be declined or rejected by said company, then the full amount paid by A. will be returned to the applicant on the production of this receipt." In fact A. did not pay any money at this time, but only gave a promissory note for the $99.80, which note he never, at any time, paid.

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Statement of the case.

Upon the trial, the court below (to which the case was submitted without the intervention of a jury, under the act of March 3d, 1865, which enacts that the court may, by agreement of parties, find the facts, and that the finding shall have "the same effect as the finding of a jury"), found, as a fact, that the company "accepted" the application and sent a policy to its agent; "but that the policy did not in terms agree with the memorandum as to date and time of payment." The policy sent made the quarterly payment $96.60 (a difference in A.'s favor), and the policy was antedated so as to run from the 5th day of April, 1867; a day which the policy showed was the applicant's birthday. This variation was of course against his interest. Accompanying the policy sent to the agent were two receipts for premiums, executed by the company in New York, one as of the *5th of April*, 1867, and the other as of the *5th of July*, 1867, under which receipt was a "Notice to policy-holders," that unless premiums were paid on or before the day they became due, the policy was forfeited and void; that agents were not authorized to make, alter, or discharge contracts, or waive forfeitures; that payments of premiums to agents were not valid unless receipts were given, signed in New York by the officers of the company, the local agents to countersign them as evidence of payment; and that all premiums were payable in New York. The policy and these receipts reached the agent at San Francisco on the 2d of August, having been executed in New York, probably twenty-three to thirty days before. The agent countersigned them, and on the 8th (six days after receiving it) wrote to A., then absent from home, informing him that his policy had arrived, and asking whether he would have it sent to him or held subject to his order. It did not appear whether A. received or did not receive the letter. On the 21st of August he was shot (becoming at once insensible), and died on the 20th of September. *Held*, that owing to the change of terms in the policy from those contemplated by A., the applicant, the acceptance by the company was a qualified acceptance which A. was not bound to accept; that there having been no evidence that he did accept it the company was not bound.

ERROR to the Circuit Court for the District of California, in which court the administrator of McPherson Young, of San Francisco, sued the Mutual Life Insurance Company of New York (a company incorporated by the State of New York but having a general agent, one H. S. Homans, at San Francisco, and an office there for the transaction of life insurance business) to recover $5000, which the administrator alleged had been insured by the said company on the life of his decedent and not paid.

The case was submitted to the court under the act of

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March 3d, 1865, without the intervention of a jury. This act enacts that parties may submit issues of fact in civil cases in this way; that the finding of the facts by the court may be general or special, "and shall have the same effect as the verdict of a jury." And it adds that "when the finding is special the review may extend to the determination of the sufficiency of the facts to support the judgment."

The case, as found by the court was thus:

On the *5th of June*, 1867, the said McPherson Young made application to the said Homans, general agent as aforesaid, for an insurance of $5000 on his life, and thereupon entered into a contract with Homans, as such general agent, in these words:

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

"Received, San Francisco, June 5th, 1867, from McPherson Young, of San Francisco, California, $99.30, being the first quarter-annual premium on his application for a policy of insurance of the Mutual Life Insurance Company of New York, for the sum of $5000 on the life of said Young, payable at forty-five or death, and premiums paid up in full in ten years; said policy of insurance to take effect and be in force *from and after the date hereof*, provided *that said application shall be accepted by the said company;* but should the same be *declined* or rejected by said company, then the full amount hereby paid will be returned to said applicant upon the production of this receipt.

"For the Mutual Life Insurance Company,

"H. S. HOMANS,
"General Agent for the Pacific Coast."

The finding of the court proceeded:

"The application of the said Young was transmitted to the said company, and *was by them accepted;* and a policy was made out, signed, sealed, and transmitted to the general agent, who received the same about the 2d of August, 1867. *But the policy did not in terms agree with the memorandum as to date and time of payment.*"

The $99.30 mentioned in this receipt were not paid in money; Young simply gave his note for the amount, pay-

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able to Homans, personally, at sixty days, which note was never paid.

By the terms of the receipt, as the reader will have noted, the policy contracted for was to take effect and be in force from the date of the receipt, that is to say, from the *5th of June*, 1867. The quarterly payments would thus, of course, have been to be made on the 5th of September and the 5th of December, 1867, and on the 5th of March and the 5th of June, 1868, and so on till the ten years had expired or death had supervened. The quarterly payments, too, were to be $99.30.

The policy as issued differed from that contemplated by the receipt, in these particulars:

1st. It bore date the *5th of April*, 1867, and instead of being made to take effect from the 5th of June, was made to take effect from the said preceding 5th of April.

2d. The quarterly payments were to be $96.60 instead of $99.30.

3d. The days of payment during the ten years were to be the 6th days of April, July, October, and January, instead of the 5th days of June, September, December, and March.

The policy, in which Young's age was stated to be twenty-six years, witnessed that "in consideration of the representations made and of the sum of $96.60, to them *duly paid* by McPherson Young, and of the quarter-annual *payment* of a like amount on or before the 6th days of April, July, October, and January, in every year during the continuance of the policy, the company agreed to pay the said amount of $5000 to the said McPherson Young or his assigns, *on the 6th of April*, 1886, *when the above-named person, whose life is hereby insured, shall have attained the age of forty-five years;* or, should he die previous to attaining that age, in sixty days after the notice and proof of his death, to his executors, administrators, or assigns; the balance of the year's premium, if any, being first deducted therefrom."

The policy contained a provision, that—

"If the said premiums shall not be *paid on or before the days above mentioned* for the payment thereof, . . . then in every such

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case the company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine."

At the date of these transactions, the time required to go from New York to San Francisco—there being then no overland route—was from twenty-three to thirty days.

The policy after being executed was transmitted by the company in New York to Homans at San Francisco, where it arrived on the 2d of August, 1867. With the policy were transmitted and received two receipts for premiums, assumed to be due April 6th, 1867, and July 6th, 1867, signed by one W. Stewart, secretary of the company in New York; one of them, the one for the April premium, will show the form. It was thus:

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

"BROADWAY AND LIBERTY STREET, NEW YORK,
"April 6th, 1867.

"Received from McPherson Young $96.60 for the quarter-annual premium on policy No. 65,733, due the 6th of April, 1867. For terms of mutual agreement, see *application* and policy.

"WILLIAM STEWART,
"Secretary.

"Countersigned at ———.

"H. S. HOMANS,
"Agent."

On this receipt, as on that for the July premium, was affixed, on the 2d of August, 1867, by the agent, Homans, a cancelled revenue stamp, and the receipts were countersigned by Homans, as indicated in the copy of the one above given.

To both the receipts was annexed a document, thus:

"NOTICE TO POLICY-HOLDERS.

"The agreement is mutual (see *application* and policy), that unless the premium is paid on or before the day it becomes due the policy is forfeited and void. Agents are not authorized to make, alter, or discharge contracts or waive forfeitures. Payments of premiums to agents are not valid unless receipts be given signed by the president, secretary, cashier, or actuary

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When receipts are sent to agents for delivery, *such agents shall countersign the same as evidence of payment to them. All premiums are due and payable at the office in New York.* For the convenience of the assured they may be made to an agent, but only upon the production of the receipt above specified.

"F. S. WINSTON.
"President."

On the 8th of August, 1867, that is to say, *six days* after the policy was received by the agent, Homans, he wrote to Young, addressing him at Vallejo, California, as follows:

"SAN FRANCISCO, August 8th, 1867.

"McPHERSON YOUNG, ESQ.,
"Vallejo, California.

"DEAR SIR: Your policy of insurance with the Mutual Life Insurance Company has arrived. Please inform me whether I shall send it to you at Vallejo, or if you will call and get it when you are in the city.

"H. S. HOMANS,
"General Agent."

The case, as found, continued:

"But whether said note was delivered to or received by said Young, or when forwarded, and in what manner, does not appear from the evidence. No notice of *the acceptance* of said application, or of the issue and arrival of the said policy is shown to have been delivered to or received by said Young, nor was any demand made upon him for further payment, nor any receipt or notice requiring payment presented to him."

Young was shot at Vallejo on the 21st of August, 1867;* and removed on the next day to an hospital in San Francisco, where he died on the 20th of September following; having, from the time that he was shot, been physically and mentally unable to attend to any business. After his death, the agent wrote "Cancel; dead," on the policy, and sent it with the two receipts of April 6th and July 6th for premium, attached to the policy and uncancelled, and the note for $99.30,

* The shooting was stated, in the opinion of the court below, to have been accidental.

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which Young had given to the agent June 5th, 1867, to the office in New York, where the officers, on the 21st of October, cancelled the policy by tearing off the seal and cutting out the name of the president. The note for the $99.30 remained in the company's hands unpaid, but was never surrendered or offered to be surrendered to Young. The word "cancelled" was written across its face in lead, but by whom did not appear. No subsequent premium was ever demanded by the company or paid.

Administration having been granted on the estate of Young, the administrator sued the company.

The declaration alleged that on the *5th of June*, A.D. 1867, the company caused to be made a policy of assurance, purporting that, in the consideration of $99.30, then paid, being the first quarterly annual premium for the sum of $5000 of the life of McPherson Young, payable at forty-five or death, and *his promise and undertaking* to continue to pay thereafter to the said company, the defendant, like quarterly payments of $99.30 during the term of ten years thereafter, if he should so long live, they did assure, and agree, to and with the said McPherson, that they would pay unto him, upon his attaining the age of forty-five years, or to his executors, administrators, or assigns, in case he should die before attaining that age, the sum of $5000. And that the said McPherson, in all things, performed the agreement, and all the conditions and promises which by the terms of the said policy were by him to be performed.

The defendant pleaded the general issue, and also two special pleas:

1st. That the policy was issued and delivered to the deceased *on the 6th of April*, 1867; that the premium therein agreed to be paid was not paid, and had never been paid; and that by the rules of the company, of which the decedent had full knowledge, this non-payment operated as a forfeiture.

2d. That another premium, the second, came due *July 6th*, 1867, that this had not been paid, and that the non-payment operated as a forfeiture, &c., all as before.

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The court below gave judgment against the company, and the company now brought the case here.

Mr. W. D. Davidge, for the company, plaintiff in error:

I. *The finding of the court does not sustain the contract set out in the declaration, and upon which issue was joined.*

The court found no such remarkable contract as is alleged in the declaration; a contract whereby a party is insured in the sum of $5000, in consideration of $99.30 paid, and his *promise* to make similar quarterly payments; nor indeed is there any contract of insurance at all found.

The court did find that the application was accepted; and if such acceptance, accompanied, as it was, by the act of transmitting a policy different from that applied for, constituted in law an absolute, instead of a qualified acceptance, then there was found a contract to insure. But a contract to insure is not a contract of insurance. Still less is a contract to insure in consideration of the *payment* of quarterly premiums of $99.30 for ten years, a contract of insurance, in consideration of the payment of the first quarterly premium of $99.30, and the *promise* of the assured to make other similar quarterly payments during the ten years.

The question presented is not one of mere variance. It is not that the policy declared on was misdescribed, but that the finding shows there never was any policy at all; and, more than this, the declaration alleges a policy with conditions, and avers that such conditions were performed by the assured. The finding does not show what were the conditions, nor that they were performed; and even if it be assumed that a contract to insure, specially found, would sustain an averment of a policy of insurance, still the allegation that there were conditions, and that they were performed, would have to be found, otherwise the plaintiff would be absolved from performance of the conditions.

It is admitted that, upon a contract to insure, the assured has a remedy by action at law, as well as by bill in equity,*

* Commercial Mutual Marine Insurance Company v. Union Marine Insurance Company, 19 Howard, 318, 328.

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but it is maintained that, in such action, the plaintiff must show the conditions of the policy contracted for, and that the loss claimed would be recoverable under them. He must give the same evidence of compliance with such conditions as if the action was founded on the policy itself, and is not to be discharged from them, because he is suing upon a contract to issue a policy instead of the policy.

II. *The finding does not show any liability on the part of the company.*

1. If the acceptance of the application and transmission of the policy be taken together, they show, as was doubtless the case, a *qualified* acceptance of the proposal to insure. The only overt act found is the transmission of the policy; and the acceptance of a proposal consists in some overt act intended to signify to the other party such acceptance. The overt act may be by words spoken, or mailing a letter, or otherwise, but, whatever the form, until such act there is no *aggregatio mentium.**

Here the overt act was not, in essential particulars, in accordance with the terms of the offer. The policy differed to the disadvantage of Young from the application in respect of date, from which the policy was to take effect, and the time for making payment of premium. Instead of making the policy begin June 5th, 1867, it made it begin two months earlier, so a second premium came due two months before the time that Young proposed. The loss to the applicant by this change is obvious, and needs no comment. The policy was not then an unqualified assent to the terms of the application. The minds of the parties did not meet, and there was no contract, and indeed none is found by the court below. Certainly Young was not bound to accept the policy. The company could not, after tender of it, have maintained an action to recover the amount of the note, but he had a complete defence in the fact that the policy differed substantially from the application, and the

* Tayloe v. Merchants' Fire Insurance Company, 9 Howard, 390; Hallock v. The Commercial Insurance Company, 2 Dutcher, 268; Heiman v. Phœnix Insurance Company, 17 Minnesota, 158.

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magnitude and effect of that difference were matters for him to decide.*

If he was not bound, neither was the company.

2. If the acceptance found be dislocated from the overt act, without which in some shape there can be no assent to a proposal, how then stands the case?

The terms of the application are not found. It is only by inference that the conclusion is reached that they were the terms mentioned in the receipt. But the case is that of a special verdict, and in a special verdict the court can intend nothing. It is the province of the jury, or the court discharging the office of the jury, to draw inferences. Neither the court below as a tribunal of law, nor this court can draw them. But waiving this objection it is apparent that the subject-matter of the application was a policy of insurance, and the law would presume a policy on the usual conditions. But what were these conditions? The finding is silent. That there were conditions is admitted by the declaration. But what were they?

Waiving too this difficulty, let it be inferred that the policy found by the court contained the usual conditions, as doubtless it did. What then? Why then the policy to which the applicant was entitled under the contract assumed to have been made contained the condition that the policy should cease and determine in the event of non-payment of premiums. By the very contract assumed then it was a condition, that the regular quarterly annual premiums should be punctually paid, and those premiums were payable on the 5th days of June, September, December, and March. Were the premiums of the 5th of June and 5th of September paid? Plainly not. For the first, the note was given but never paid. As to the September premium, no further attention was paid to it by the applicant than if the assumed contract had never been made.

If the assumed contract ever existed, it arose when the application was accepted. It matters not whether the appli-

* Eliason v. Henshaw, 4 Wheaton, 225.

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Argument for the assured.—An absolute acceptance made by the insurers.

cant knew of the acceptance or not. He knew of his offer, and that such offer would, upon acceptance, ripen into a contract, and that such contract must devolve upon him certain obligations. He is presumed to have known the law and the character of the policy for which he had applied.

The applicant then failed to pay the note given in anticipation of the first premium, and also the second premium. The fact of non-payment of the first note is established by the finding.

Even if there was no default in the payment of the first premium, there certainly was in that due the 5th of September.

The condition as to payment of premium in both the assumed contract and that evidenced by the policy is the same.

This condition is plainly a condition precedent. The payment of the premium is explicitly declared to be indispensable to the continuance of the contract, or, in other words, such payment is a condition precedent.

In *Ruse* v. *Mutual Life Insurance Company*,* the provision of the policy, as to the payment of premiums during the continuance of the policy, was almost identical with that in the present case. It was held that such a provision created a condition precedent, without performance of which the plaintiff could not recover, and to the same effect is the later case of *Howell* v. *The Knickerbocker Life Insurance Company*,† where performance was rendered impossible by the act of God; the assured intending to pay the premium but being prevented by an attack of apoplexy two hours before the policy expired. But we need not cite cases to prove settled law.

Messrs. Henry Beard and William Todd Otto, contra:

The questions to be decided arise upon a case found by the court below; a case in the exact nature and with the exact effect of a special verdict: where, as the opposing counsel say, this court cannot draw inferences.

* 23 New York, 516.

† 44 Id. 276.

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Argument for the assured.—An absolute acceptance made by the insurers.

This finding or special verdict—the case—shows:

1. That on the 5th June, 1867, Homans, agent of the New York company, received from Young his note of $99.30, as the first quarterly premium on an application by Young to the company for a policy for $5000 on his own life, payable at forty-five or death, and premiums paid up in full for ten years; and that it was then agreed between Young and the agent of the company that such a policy, from the company, should take effect and be in force from the said 5th of June, provided that the application should be accepted by the company; but that if it should be declined or rejected by the company then that the note should be returned.

The case shows with equal distinctness, and by an express finding,

2. That the application of the said Young was transmitted to the said company and was not declined nor rejected, but that it was by them "accepted," and that a policy in response to the application was made out, signed, sealed, and transmitted to the general agent, who received it, and informed Young that it was awaiting him.

The finding that the application was "accepted" by the company is a finding of a fact. There is nothing to show that an acceptance is found by the court because a policy was transmitted for the applicant. To infer an acceptance from that cause would be to make a conclusion of law, and not to find a fact; which alone, in this part of the case, it was the court's duty to find. There was doubtless evidence, independent of the transmission of the policy, to show an acceptance.

Now, in point of fact, it cannot be doubted that the company meant the policy sent to be, not a rejection of the proposition made, and another proposition; nor, in truth, a *qualified* acceptance of anything, but to be a substantial compliance with the proposition; a compliance more favorable, if anything, to the applicant than would have been a literal compliance. For though the policy sent did differ in dates and premiums from the offer made, the result of the difference was practically small, and might prove a gain to Young.

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Argument for the assured.—The absolute acceptance made, not kept.

So far as the *amount* of premium offered was concerned, Young was plainly a gainer. He offered $99.30. The company took $96.60. The agent had doubtless miscalculated the value of the life. *He* asked more than the company's rates required. Had Young paid for ten years, which at the age of twenty-six it seemed probable that he would do, the difference would have been $108, pure gain to him. Then, on the other side, the company made the risk begin two months before Young did. The reason is obvious; for the policy shows that Young's birthday was the 5th of April, and the payment became due on his arriving at the age of forty-five; and doubtless in order to facilitate calculation that day was taken. The change caused Young to pay two-thirds of $96.30, that is to say, $64.20 more than he offered. So that as undoubtedly the company hoped that Young would live for the whole ten years during which premium was to be paid, and as of course Young expected to do the same, we have a case where on both sides the policy was meant to be in substance what was asked for. Indeed, in a certain result, that is to say, if Young died on a certain day, the result might be *exactly* the same as would have been a literal compliance.

The opposing counsel, however, consider that the offer made by Young was in fact and form and substance rejected, as one that the company's interest required it to reject; and that a new proposition, one more favorable to its own interest, was offered; and, so far as the company was concerned, accepted in advance. They treat the differences between the proposition and the policy as wide—substantial—and for the sake of the argument we shall now in what we have to say so regard them.

We set out then on the assumption—one which there is then no evading or avoiding—that the company did, as matter of fact, "accept," Young's proposition, as made.

Opposing counsel speak of a "*qualified* acceptance" as the acceptance which was made. But this is their language; not the language of the finding. *It* says that "the applica-

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tion of the said Young was accepted." And again it speaks of an acceptance simply, when it says, "No notice of the acceptance of said application was given." An "acceptance" simply, is an acceptance unqualified; and an acceptance unqualified is an acceptance absolute; an acceptance pure and simple. After this finding of an absolute acceptance, and the signing, sealing, and transmission of a policy, the finding continues: "But the policy did not, in terms, agree with the memorandum as to date and time of payment;" and the differences are stated.

We have then the case of an application to the agent for a policy of a certain date and time of payment, and a contract to furnish such a policy, provided the application is accepted, and an acceptance absolute of the proposition. But instead of the transmission of a policy according to the application which has been accepted—that is to say, one with the proper dates, we have the transmission of one with other dates, dates not according to the proposition which has been accepted, that is to say, one with improper dates.

Now what, in law, is the effect of such a transaction? The same exactly as exists in the case of a statute enacting that such and such things shall be, with a proviso repugnant to the nature of the enactment. Such a proviso is simply insensible and void.

If A. offer to sell to B. a house for $10,000, the offer being perfectly explicit, with leave to B. to accept, or to decline, or reject within ten days, and B. within the ten days says, "I do not decline your offer, nor reject it; I accept it;" and with this absolute acceptance he send B. $9750, can any man say that the making of this is a "qualified acceptance," or a refusal to accept what is offered, and the making of a new proposition to treat on a different basis? Could not B. keep the $9750 and sue for the balance? The case before us is after the finding of an acceptance absolute, in essence, that case. And it is unimportant in what way you vary the figures, so long as you assume that there have been—what is here found as part of the case—that the offer made was "accepted."

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This "pinch," the opposing counsel perceive and admit when they say:*

"The court did find that the application was accepted, and if such acceptance, accompanied as it was by the act of transmitting a policy different from that applied for, constituted in law an absolute instead of a qualified acceptance, then there was found a contract to insure."

And then they go on a technical ground, shown by themselves, it may be added, not to be true as respects a right to sue, that a contract to insure is not a contract of insurance.

Then, if our position as to the effect of sending an improper policy after the proposition of Young had been "accepted," is right, we have the case, confessed by opposing counsel to exist, of a contract to insure according to the application; and an admission also "that upon a contract to insure, the assured has a remedy by action at law, as well as by bill in equity."

The only difficulty set up on the other side is "that in such action the plaintiff must show the conditions of the policy contracted for, and that the loss claimed would be recoverable under them;" and that here two payments were due, which were conditions precedent to the policy taking effect, and that those two payments or the second one has not been made.

Let us concede this as a general proposition, to be true. But it is equally true that such prepayment may be waived.

And the question now is, has it in the case before us, been waived?

We assert that it has been.

It is elementary law that forfeitures are not favored, and that provisions for forfeiture must be strictly construed. The authorities also hold that these principles are applicable to forfeitures in insurance policies; that the provisions for forfeiture are inserted for the benefit of the companies and may be waived by them; and that courts will find a waiver upon slight evidence.†

* *Supra*, p. 92.

† See among many cases, Ripley *v.* Ætna Insurance Company, 29 Bar-

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Argument for the assured.—Forfeiture for non-payment waived.

Now, let us see how the company itself applied these principles to the facts of this case.

The company asserts by its special pleas that the policy was issued and delivered to the defendant April 6th, 1867; that the first premium was not then paid; and that the second premium fell due July 6th, 1867, and was not paid.

The policy bears date April 5th, and the receipts prepared by the company correspond with this date. The company, therefore, regarded the second quarter's premium as due July 6th, and acted upon that idea, although the application was made, and the first memorandum, receipt, and contract given on June 5th. The promissory note given for the first quarter's premium being payable without grace, fell due August 4th. It will be seen that the condition of the policy imposing a forfeiture, required payment to be made "at the office of the company *in the city of New York*, or to agents *when they produce receipts signed by the president or secretary*, unless otherwise expressly agreed in writing." There is no evidence in this case of its having been otherwise agreed in writing. It does not appear that the policy was received at the San Francisco office before the 2d of August. At or about the 6th of July the policy must have been in the defendant's office in New York, which would give twenty-seven days to August 2d, to make the passage to San Francisco. The defendant knew at the time of dispatching the policy that the second instalment of premium had *not* been paid *at the office in New York*. It also knew that it *could not be paid to its agents in San Francisco* in accordance with the terms of the contract, so as to be obligatory upon defendant, for the reason that the *only receipt duly signed as specified in the policy* authorizing the payment to its agents was attached to the policy, and would not reach San Fran-

bour, 557; Goit v. National Protection Insurance Company, 25 Id. 189; Baker v. Union Life Insurance Company, 6 Robertson, 394; Boehen v. Williamsburg Insurance Company, 35 New York, 131; Bouton v. American Mutual Life Insurance Company, 25 Connecticut, 542; Pino v. Merchants', &c, Insurance Company, 19 Louisiana Annual, 214; Insurance Company v. Webster, 6 Wallace, 129.

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cisco till the month of August, a month after it was due. The defendant did not expect payment at its office in New York city, or it would not have sent its receipts to its agent to enable him to receive payment. The defendant, then, by its officers in New York transmitted the policy and receipts with knowledge that payments had not and would not be made at the office in New York, and that it *could not be made elsewhere* in the mode required by the terms of the contract for a month after due. Yet the policy was sent with an intent that it should be delivered, and payment received by its agent in San Francisco, although it knew that there must necessarily be a forfeiture upon the strict letter of the contract. Also, after the receipt of the policy at San Francisco, on the 2d of August, nearly a month after the second instalment fell due, according to the terms of the policy, the defendant's agent, necessarily knowing that payment had not been made, stamped and countersigned the receipt, ready for delivery upon payment, thereby treating the agreement as still in force. Again, on the 8th of August, four days after the note given for the first quarter's premium fell due, and after default in payment, and, necessarily with knowledge of non-payment of both the note and second instalment, the agent of the defendant addressed to Young the note of the day just named, and set out, *supra*, p. 90.

This act, after the forfeiture, if any there was, had attached, recognizes the agreement as being still in force. The letter does not even demand payment, or refer to the fact of non-payment, or fix any time when the insured should call for the policy, or make payment. It simply informs him that his policy has arrived, and asks whether it should be sent to him at Vallejo, or whether he would call and get it, when in the city, implying that it would be at his option to have it sent to him at once, or wait his convenience till he should come to the city and be able to call for it. The defendant manifested no haste or anxiety upon the subject, for the policy was on hand from the 2d to the 8th of August at least before the notice to Young was even written, and it does not appear when it was sent. It does not appear that

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this, or any other notice, reached him. No other act of the company is shown inconsistent with this action, or tending to show an intention to insist upon a forfeiture till after the death of Young, when the policy was cancelled October 31st; payment of the loss having before been refused.

It could hardly have been expected that Young would call to make the second payment until informed whether the risk had been accepted, especially as there was ample time between June 5th, when the application was made, and the 5th of September, the time when the next payment would have fallen due, had the date of the policy agreed with the date of the application, and the preliminary memorandum of agreement given to him by defendant's agent in San Francisco. It was, doubtless, supposed that notice of acceptance or rejection would be given before the note for the first quarter's premium would fall due. But however this may be, the several acts of the defendant, and all its acts, and the acts of its officers in relation to the matter, which were performed subsequent to the accruing of the forfeiture, if any accrued, treat the agreement for insurance as still in force. They, affirmatively, indicate an intention, not to insist upon a forfeiture, and had the accident and death not occurred, there can be no doubt, from the facts found, that even as late as the death of Young, the premium would have been received and the policy delivered. We submit that upon the case as found there was a waiver of any forfeitures which had accrued, and that under the circumstances, after the death of the assured, it was too late, for the first time, to insist upon the forfeiture.

In conclusion, and reverting here to an earlier point of the argument, we may say that the counsel of the other side in arguing that the company in sending the policy which they did, only *declined* the proposition which Mr. Young made, and simply *proposed* a new one to him, are forced to assume that the company committed an impropriety towards Mr. Young and a departure from the usual, proper, decorous, and therefore the legal modes of doing business. The

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company was perfectly free to accept or to decline the proposition made to them. If they meant to decline it and to propose a new proposition, their duty was to do this by a proper and customary sort of communication; and not to make out a new policy such as *their* interests but *not* Mr. Young's dictated, and then, however much against *his* interest, and only because it was in advancement of *their own*, force it down on him under penalty perhaps of his being harassed soon afterwards by a lawsuit for premiums, as upon an implied acceptance by him, unless he could show that, at his own cost and charges, he at once pitched their unasked for and undesirable policy back into their face. Decency requires that any insurance company which thus seeks to force men into *its* purposes, against their own, should be held to have said, "Our policy sent is so favorable to us and so little favorable to you that we are willing to be bound, till we hear affirmatively from you that you do not accept; not expecting to hold you till we hear positively that you do." In such a case the company takes the risk of death occurring before an affirmative reply is received; and if death does occur, the company is concluded.

We are not here asserting that a "contract" in the strict legal sense of that word can be made, unless the party assured have heard of what is offered and have assented to it. But whether any "contract" can or cannot be made without his doing so is not the question. The question is whether an insurance company which in the eager pursuit of its own interests, and in the disregard of other people's, so far departs from the customary, becoming, and proper modes of doing business, as to decline, in the way which it is here asserted that this company did decline, a proposition made to it, and to make, in the way, which it is here asserted that this company did make, a new proposition which it wished to have accepted,—whether a company so acting cannot be estopped from asserting, in its own interests and against the interest of its customers, that it did *not* make such a contract? And whether when, by the death of the party, that is to say, when by the act of God, it has been caught in its

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own supersubtle contrivances, and the administrator of the decedent comes into court with the company's own policy in his hand, "signed, sealed, and transmitted to their general agent," who had written to the party that it awaited his order—whether in such a case, a court may not hold "*Melior est conditio possidentis*," or, if the judicial dignity could ever properly translate the venerable maxims of the law into phrase not quite perhaps becoming the dignity of the ermine, say: "You have been rightly served."

We have, of course, in these remarks been going on the assumption of the other side, that the differences between the policy sent and the proposition made were regarded by the company as important. As we have already said, the policy sent was meant to be a substantial compliance with the proposition made by Young, and in truth was so, and certain to be accepted by him.

Reply:

1. The finding shows that Young's proposition was "accepted," not that it was "accepted absolutely." Admitting that by itself a finding that the proposition was "accepted" might mean that it was accepted absolutely, the finding of the acceptance is here not by itself. The same paragraph which states that the proposition was accepted and that a policy was sent, states also that the policy did not agree with the memorandum as to date and time of payment, and shows wherein the two things differed. This means plainly that the company accepted the life, but not the *exact* risk offered; in other words, that it accepted the proposition qualifiedly.

2. All the acts relied on as showing a waiver relate—it may be remarked—to the policy which actually issued, and not to the contract alleged to result from the acceptance of the application.

But, passing by this.

To constitute a waiver there must be a valid agreement not to insist on performance of a condition precedent, or such acts as work an estoppel, from having influenced the

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conduct of the party whose duty it was to perform the condition.

There was here no agreement; and such a thing as a waiver without the party bound to perform being influenced by the acts of waiver relied on, or being even cognizant of them, is without foundation in principle or precedent.*

Even if the acts relied on would constitute a waiver it would be merely of the article of time, and not of the payment of the premium during the continuance of the policy.

In no possible view of the case did the company consent to take the premium after the contract had been extinguished by death. Such a thing would simply abrogate any contract of insurance. Here there was no tender during the life of the party assured, nor, indeed, at any time.

4. No waiver is found by the finding, and any waiver is matter of fact.

5. It may be true that the *manner* in which the company declined the proposition made, and in which it offered a new proposition, was not the most formal that could be conceived. But we are inquiring not into forms, but into substance. The question is, "was the sending of the policy substantially the qualified acceptance of the proposition offered?" We submit that it was. The qualification proposed may have been the least possible. It was in fact but very slight. Still, Young could say, "My proposition has not been accepted. I decline the one offered; I care not whether it be better or worse; it is not *the same* as that made."

Mr. Justice SWAYNE delivered the opinion of the court.

The question presented for our determination is whether the findings warrant the judgment. The facts found lie within a narrow compass.

* Greenfield v. Massachusetts Life Insurance Co., 47 New York, 430; Traak v. State Fire and Marine Insurance Co., 29 Pennsylvania State, 198; Ripley v. Ætna Insurance Co., 30 New York, 136, 164; Baker v. Union Life Insurance Co., relied on by the opposing counsel, was reversed by the Court of Appeals, 43 New York, 283, 290.

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Several objections, some of them technical, have been taken by the counsel for the plaintiff in error to the judgment rendered. We shall confine our remarks to one of them. It is fundamental, and goes to the right, justice, and law of the case. The receipt of the 5th of June was the initial step of the parties. It reserved the absolute right to the company to accept or reject the proposition which it contained. There was a necessary implication, that if it were accepted the response and acceptance were to be by a policy, in conformity with the terms specified in the receipt as far as they extended, and beyond that, in the usual form of such instruments as issued by the company. But it was clearly within the power of the company, under the condition expressed, wholly to reject the application, without giving any reason; or to accept the proposition with such modifications of the terms specified, and of the usual conditions of such policies, as it might see fit to prescribe. The entire subject was both affirmatively and negatively within its choice and discretion. The acceptance was a qualified one, and there was none other.

It was by a policy departing from the terms specified in the receipt in the particulars before mentioned but containing as to the conditions imposed otherwise, nothing beyond what was usual in such cases. At this stage of the business, the company was not bound according to the receipt, because it had not agreed to a part of the terms specified, and those terms were material and of the essence of the proposition. Clearly the company never did agree to those terms. What it would have done if the applicant had refused, as he might have done, to take the policy it is not material to consider. It is enough that the company did not so agree.

This court has no power to make such an agreement for it. The indispensable element of the consent of one of the parties is shown not to have existed. The contrary appears by the policy transmitted to the agent. The consent of the applicant appears, but that alone is unavailing. That fact, in any sound legal view of the case, is as if it were not. In

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the analysis of the case the receipt, for the reasons stated, must be laid out of view.

This brings us to the examination of the controversy as respects the policy of insurance. Here the position of the parties is reversed. The applicant assented to the proposition contained in the receipt, but the company did not. The company assented to the policy, but the applicant never did. The mutual assent, the meeting of the minds of both parties, is wanting. Such assent is vital to the existence of a contract. Without it there is none, and there can be none. In this case it is not established by any direct proof, and there is none from which it can be inferred. This is not controverted. If it be alleged there was fault on the part of the agent, for which the company is responsible, in not communicating promptly and fully with the applicant upon the arrival of the policy, there are several answers to the imputation. Such fault, viewed in any light, cannot be taken as the legal equivalent of the assent of the applicant to the terms of the policy. But no such fault is shown. The applicant knew that the company was not bound, and would not be bound until it chose to become so, and that it had the right to do what it did. It was his duty to keep up the necessary communication with the agent by calling upon him when the answer from the office in New York might have been expected to arrive, and if he intended to be absent, by giving the agent his address during his absence, and taking from him a promise to communicate the result as soon as the reply was received.

It does not appear that he took any step whatever in this way. Neither he nor his personal representative, therefore, had any reason to complain. If he had received notice of the proposition made through the policy it would have been at his option to give or refuse his assent. He was certainly in nowise bound until such assent was given. Until then, there could be no contract on his part, and if there was none on his part, there could be none on the part of the company. The obligation in such cases is correlative. If there is none on one side there is none on the other. The requisite

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assent must be the work of the parties themselves. The law cannot supply it for them. That is a function wholly beyond the sphere of judicial authority. As the applicant was never bound, the company was never bound. The policy was, therefore, no more a contract than the receipt. Both had the same fatal defect, the want of the assent of one of the parties.

Even where the parties supposed they had agreed and it turned out there was a misunderstanding as to a material point, the requisite mutual assent as to that point being wanting, it was held that neither was bound.*

The deceased paid nothing. The contest is an effort on that side to gather where he had not sown. The law involved is expressed by the phrase "it takes two to make a bargain."

In this view of the case, irrespective of the other considerations which have been urged upon our attention, we hold that the facts found do not warrant the conclusion reached.

JUDGMENT REVERSED, and the case REMANDED, with directions to enter a judgment

IN FAVOR OF THE PLAINTIFF IN ERROR.

SECOMBE v. RAILROAD COMPANY.

1. When the question is whether, under the constitution and laws of a particular State, a company professing to be a corporation, is legally so, this court will receive as conclusive of the question, the decision of the highest court of the State deciding, in a case identical in principle, in favor of the corporate existence.
2. The taking of private property in order that a railroad may be made, belongs to the class of things which in proper cases are to be regarded as public necessities.

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* Baldwin & Forbes v. Mildeberger, 2 Hall, 176, a case at law; Coles v Browne, 10 Paige, 526, a case in equity; see also Calverley v. Williams, 1 Vesey, Jr., 210, and Crane v. Partland, 9 Michigan, 493

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Statement of the case.

3. The *mode* of exercising the right of eminent domain, in the absence of any provision of organic law prescribing a contrary course, is within the discretion of the legislature. There is no limitation upon the power of the legislature in this respect if the purpose be a public one and just compensation be paid or tendered to the owner for the property taken.
4. A judgment of condemnation rendered by a competent court, charged with a special statutory jurisdiction, and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction.

ERROR to the Circuit Court for the District of Minnesota; in which court Secombe brought ejectment against the Milwaukee and St. Paul Railway Company, to recover a lot in Minneapolis used by the company for a station.

The cause was heard by the court without the intervention of a jury.

It was admitted that Hiram Osborne and Ovid Pinney, under whom Secombe, by deeds of quitclaim made in 1870, claimed, had once been owners of the lot. But the railway company was now in possession of it, claiming under an act of condemnation made in 1867—three years before the deeds of quitclaim—in favor of the Minnesota Central Railway Company, in the alleged exercise of the right of eminent domain. The company defendant had succeeded to that company's rights.

Against the right of the Minnesota Central Railway Company, in whose favor the judgment of condemnation was entered, Secombe alleged:

1st. That under the constitution and laws of Minnesota the company was not a corporation, and, therefore, under the said laws not authorized to procure a condemnation in any form.

2d. That whether it was a corporation or not, all of the proceedings taken to obtain title to the lot were, under the said constitution and laws, void.

The case was thus:

In 1856, the territorial legislature of Minnesota incorporated a certain railroad company under a name then given to it.

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In 1858, the Territory became a State and made a constitution.

This constitution prohibited the "*formation*" of corporations by *special act.**

It ordained also that "no person should be deprived of property without due process of law," and that private property should not be taken for public use without just compensation therefor "first paid or secured."†

About the same time, by a constitutional amendment, the State authorized the company above mentioned as incorporated by the Territorial legislature in 1856, and to which it had since made a loan of its credit by the issue of State bonds, for the payment of whose interest the company was to provide, to mortgage its roads, franchises, &c., to the State as security for payment of the principal and interest of the bonds. The railroad company made the mortgage, but paid neither principal nor interest on the State bonds; and in 1860, the legislature of the State, by an act declaring that a default had occurred on the part of the company, in paying the interest on the bonds, directed the governor to foreclose the mortgage, and to bid in and purchase the roads and franchises in the name of the State. This the governor did.

In the following year, 1861, the legislature by another act—a special act—which recited the act authorizing the foreclosure of the mortgage, and the purchase and acquisition of the road, its franchises, &c., by the State under the foreclosure—granted the road, its franchises, &c., to certain persons who had organized themselves into another company; the grant being subject to certain conditions, for the non-performance of which the grant was to be forfeited.

In 1862, the conditions having been broken, and a forfeiture having occurred, the road was regranted to a yet third set of persons organized into a new company, and called the Minnesota Central Railway Company.

It was this company which had caused the lot in question to be condemned for the purposes of its road; and the com-

* Article 10, section 2. † Ib., section 4.

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pany derived its corporate existence under legislation of the same character as did the St. Paul and Pacific Railroad Company, which in the case of the *St. Paul and Pacific Railroad Company* v. *Parcher*,* the Supreme Court of Minnesota held good and constitutional. That court considered that although corporations could not be formed by special act, yet that the State could buy the property including the franchise—or right to be a corporation of a corporation already created—and could hold without a merger, if it was for its interest and it desired to do so, the franchise which it had thus bought. It considered further that it was for the interest of the State to do so, because this would better enable it to secure the successful prosecution of important enterprises which it could not well carry on itself; while, that it was the intention of the State to keep alive the purchased franchise and hold it without merger, sufficiently appeared, the court thought, from legislation subsequent to the foreclosure. The court, in conclusion, said:

"There was no attempt here to create *new* corporate franchises, and thus to form and to bring into existence for the first time that which is the very essence of a corporation, and without which a corporation is nothing. But corporate franchises already in existence and held by the State as property, without merger in its general sovereignty and without extinguishment, were *transferred* to the persons enumerated in the act. This, we think, was a legitimate and constitutional transaction."

The part of the case relating to the proceeding of condemnation was thus:

An act of 1862 enacted:

"SECTION 10. The said company shall have the right of way upon any lands, to survey and lay down said road, not exceeding two hundred feet in width, and whenever it is necessary to have such lands, they shall have the right to enter upon, take and hold such lands, and occupy the same. When the same shall not be granted to said company, the compensation to be paid therefor shall be thus ascertained. The said company shall

* 14 Minnesota, 297.

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apply to the Judge of the District Court of the Territory of Minnesota, for the appointment of three commissioners, whose duty it shall be, to proceed to assess the damages which may be sustained by the several owners of the lands through which the road of said company is located. It shall be the duty of said company to give thirty days' notice of their application for the appointment of said commissioners, in one or more newspapers published in each of the counties through which said road is laid out; and it shall be the duty of such commissioners to cause ten days' notice of their meeting to appraise the damages of any land through which said road may run, to be given to the owner or claimant thereof. Either party feeling aggrieved by the decision of such commissioners, may appeal to the District Court of the county in which such land may be situated; and said appeal shall be tried in the same manner as if commenced therein. The notice to be given by the commissioners to the owners of lands required by the railroad, shall be in writing, and delivered to said owner or owners, or left at their usual place of residence; or if non-residents, then said notice shall be published in the nearest newspaper to where said land is situated, at least four weeks before making such appraisement."

The court below found as facts the following matters; this finding under the statute authorizing such finding of fact by the court, being in the nature of a special verdict:

1st. That, on the 26th of September, 1863, the company petitioned the District Court of the Fourth Judicial District of Minnesota, for the appointment of three commissioners to assess the damages which might be sustained by the owners of the land in question, by reason of the appropriation of it for railroad purposes.

2d. That the company had, previously to the said time, given thirty days' notice of their intended application, directed, among other persons, to Hiram Osborne and Ovid Pinney (the then owners), in the *State Atlas*, a newspaper published in the county.

3d. That the court appointed certain persons (named) as commissioners for the said purpose.

4th. That the commissioners, at least four weeks before the 2d day of December, 1863, published in the said *State*

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Atlas notice of their meeting to appraise the damages of the said premises on the said 2d day of December, 1863, which notice was directed to Osborne and others, naming them. That Osborne could not be found in Minneapolis, and that his place of residence was unknown to the commissioners.

5th. That, on the 8th of April, 1864, the commissioners reported that they had awarded damages for the land entered upon and taken possession of by the company in the sum of $40; which report was, on the 16th day of April, 1864, filed with the clerk of the court.

6th. That, at a general term of the court, on the 20th of July, 1867, the court made an order that the award be confirmed, and judgment be entered thereon in conformity with the award, and that the $40 be paid into court by the company on the judgment to be entered, by leaving the same with the clerk thereof.

7th. That on the 22d of December, 1868, on motion of the company, a judgment was entered by the clerk in favor of the said Minnesota Central Railway Company, confirming the award, and directing that the said sum of $40 be paid into court by leaving the same with the clerk; and that the company at the time of the entry of judgment, paid into court the sum of $40.

8th. That the said judgment was thereupon docketed and satisfaction thereof entered by the clerk as against said company; and that a copy of the judgment, certified by the clerk, with his certificate that the same had been satisfied as against the said company by the payment of the said sum of money into court, was thereafter recorded in the office of the register of deeds of the said county.

No fact material to the issues appeared upon the trial other than the foregoing.

It was not shown upon the trial in any way or manner that Osborne or Pinney ever appeared in any of the said proceedings, or that any personal notice was ever given to or had by the said Osborne, of any of the said proceedings, or that any notice other than as aforementioned was given to or had by either of the said persons; or that the said

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State Atlas was the nearest newspaper to where the premises described in the complaint were situated.

The court below gave judgment for the defendant, and from that judgment the case now came here.

Mr. Secombe, propriâ personâ, *plaintiff in error:*

1. *The Minnesota Railway Company, in whose favor the condemnation is alleged to have been made, had no corporate existence.*

The constitution of Minnesota ordains, in express terms, that railroad corporations shall not be formed by special law. Now this provision of fundamental law has been violated, if not in letter, certainly in spirit. No railroad corporation was, indeed, created in the exactly ordinary way, but there being a railroad corporation already in existence, with roads, franchises, and all other requisites of a railroad, under mortgage to the State, the mortgage is foreclosed, and the mortgaged property, including franchises and all other requisites, is bought by the State itself, and then, by a special act, it all is granted out to certain individuals, and in *St. Paul and Pacific Railroad* v. *Parcher*, this is held not to violate the provision of the constitution against the creation, by special law, of railroad corporations; but to be, all, "a legitimate and constitutional transaction!"

It would seem that the problem proposed to the Supreme Court of Minnesota for solution should be thus stated: "Given an express constitutional prohibition against the formation of a corporation by special act, in what way may that constitutional provision be defeated?"

The solution given by the court is ingenious, but seems to us to be in violation of the purpose of the constitutional provision thus avoided. It is a manner of dealing with a constitutional provision which should not, we think, commend itself to this court.

2. *The alleged manner of the attempted exercise of the right of eminent domain, and consequently the alleged divestiture of the plaintiff's right of possession was unconstitutional.*

There was not provided for by law a judicial trial, in determining the just compensation which should be paid for

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the taking of the private property in controversy in this case.

The constitution of Minnesota provides that no person shall be deprived of life, liberty, or property without due process of law; and this means a judicial trial. It is not necessary to assert in this case that a trial by jury is an essential part of that judicial trial. But it is absolutely necessary that there should be a proceeding in a court of competent jurisdiction, and that the party to be affected by the proceeding should be summoned into that court and have notice of the object of the proceeding.

The tenth section of the act of March 1st, 1856, which contains all that there is on the subject, provided that the judge of the District Court may be applied to, to appoint commissioners to assess the damages, and that a notice of this application shall be published in a newspaper. This act of the judge is purely ministerial, and his functions end with the appointment. This notice, which is only constructive in its nature, has expended its entire force when the appointment has been made. The commissioners thus appointed are required to give notice of their meeting to assess damages. The effect of this notice ends with the meeting which is the sole subject of the notice. An interested party may have happened to see the published notice of the application to the judge, and may have been present when the judge made the appointment. He may have had actual notice of the meeting of the commissioners, and have been present and seen them looking at the premises. But at this point the effect of the notice ends.

There is, it is true, an abortive attempt in the statute to give a judicial trial upon appeal to the District Court from the award of the commissioners, but there is an entire absence of any provision for notice to the landowner, which would require or enable him to take advantage of that opportunity. The commissioners are not required or authorized to make their award to the court, or to file it in the court or with the judge or clerk; nor are they required to notify in any way to the landowner the award or the making thereof. So that while there is here provided a proceed-

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ing in court, there is no provision made for any notice by which the court could acquire jurisdiction of the person of the landowner in that proceeding.

3. *The laws under which the attempted exercise of the right of eminent domain was made are further void, because they authorize the taking of the property before making payment therefor.*

The constitution of Minnesota provides that private property shall not be taken for public use, without just compensation therefor, first paid or secured.

The act of March 1st, 1856, provides that the lands may be entered upon, taken, held and occupied, before any steps are taken for paying or securing the just compensation.

This is in direct violation of the constitution of Minnesota.

4. *In summary proceedings, under which the rights of parties are affected and divested, without their consent, a strict compliance with all the requirements of the statute must be shown by the party claiming title thereunder.*

The only provisions of law by which the rights of Secombe's grantors could be affected are those contained in the act of March 1st, 1856.

Now, there was a non-compliance with the foregoing provisions of law:

1st. In that the said commissioners did not, at the time of their meeting, or within a reasonable time thereafter, assess the damages to the said land. The meeting of the commissioners was on the 2d day of December, 1863; they did not make their award until more than four months thereafter.

2d. In that the commissioners awarded damages for the land which had been theretofore entered upon and taken possession of by the company, at the time when the same was so entered upon and taken possession of as aforesaid.

3d. In that the company did not, within a reasonable time thereafter, pay or tender to the landowner the damages so awarded. In order to acquire the right which the company was seeking under this law, it was the duty of the company at once to tender the landowner the amount of the award, to the end that if the landowner was satisfied with the

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award he might have his money, and if he was not satisfied he might have his appeal from the award. Yet no payment was ever made or tendered to the landowner, nor was any notice ever given to or had by him, that any award had been made.

Mr. F. R. E. Cornell, contra.

Mr. Justice DAVIS delivered the opinion of the court.

The case was tried by the court without the intervention of a jury, and the only material point for inquiry is, whether on the whole case the decision of the court below, which was adverse to the plaintiff, was correct.

Whether the Minnesota Central Railroad Company, under whom the defendant claims—and which occupied for railroad purposes the land in question long before the deeds of quitclaim under which the plaintiff sets up title were made—whether this company had the right to condemn the land and took the proper steps to condemn it, depends of necessity on the laws of the State; and if these laws have been construed by the highest court of the State in a case similar in character to the one before us, the Federal courts are relieved of all difficulty.

We do not feel called upon to enter into an examination of the several acts on this subject, both public and private, which are quite numerous, in order to show that the Minnesota Central Company had a corporate existence, and was therefore capable of performing an act of condemnation. It is enough to say that the point is settled in favor of the company by the decision and reasoning of the Supreme Court of Minnesota in *St. Paul and Pacific Railroad Company* v. *Parcher*.

The Minnesota Central Company was authorized by law to procure the condemnation of land for the use of its road, and from the findings of fact by the Circuit Court it sufficiently appears that the statutory provisions on the subject were observed.

It is no longer an open question in this country that the

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mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the legislature. There is no limitation upon the power of the legislature in this respect, if the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken. This general rule has received the sanction of the Supreme Court of Minnesota in analogous cases to the one at bar.*

It hardly need be said that the taking of private property in order that a railroad may be constructed, is a public necessity. It is urged that the property in controversy was occupied before the proceedings in condemnation were begun, but there is nothing in the findings of fact to show that this was so. Even if the plaintiff were in a situation to make the objection it would not avail him, for prior occupation without authority of law would not preclude the company from taking subsequent measures authorized by law to condemn the land for their use. If the company occupied the land before condemnation without the consent of the owners, and without any law authorizing it, they are liable in trespass to the persons who owned the land at the time, but not to the present plaintiff.

It is urged, also, against the validity of the award of the commissioners that it was not made in reasonable time, or the amount of it ever paid or tendered to the parties in interest. Whether this be so or not does not concern the plaintiff. It is enough for him to know that a judgment was entered confirming the award, and the money paid into the court for the use of Pinney and Osborne, and is there now unless they have seen fit to withdraw it. It is a fair presumption, as both these persons had notice, actual or constructive, of the proceedings in condemnation, and took no steps to review them, that they were either satisfied with the award or concluded they could not make successful opposition to it.

* Weir v. The St. Paul, Stillwater, and Taylor's Falls Railroad Co. 18 Minnesota, 155; Langford v. Commissioners of Ramsey County, 16 Id. 375.

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Syllabus.

This suit is an effort to question the propriety of the condemnation and sale of the property in a collateral proceeding, not by the party even whose land was appropriated, but by a stranger to the original proceeding, who, whatever his motive in buying, got no other estate than the original owners could convey—a fee subject to the easement of the railroad company. The judgment of condemnation in this case was rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction.*

If it were so, railroad companies would have no assurance that the steps taken by them to procure the right of way would conclude any one, and they would be constantly subject to vexatious litigation.

JUDGMENT AFFIRMED.

LEWIS v. HAWKINS ET AL.

1 Where a party agrees to sell land to another and as consideration therefor the vendee gives his promissory notes payable at a future date named, and the vendor gives his bond conditioned that on the payment of the notes he will convey the premises in fee to the vendee, but makes no deed, the legal estate remains, until the payment of the purchase-money, in the vendor, and he has, by the law of those States where such liens are recognized, a "vendor's lien." The vendee has an equitable title only; one indeed which he can sell or devise, but one which if the purchase-money is unpaid he cannot sell so as to exclude the vendor's right to have payment of it. Any purchaser from the vendee who assumes to pay the notes takes the same title that the vendee had, that is to say an equitable title, the land being still charged with the payment of the purchase-money.

2. A discharge of such purchaser from the vendee under the Bankrupt Act, will relieve such purchaser from paying the notes, but it will not give

* 1 Redfield on Railways, 5th edition, p. 271.

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him a legal title in fee to the lands. That title, subject to the equity of the vendee, or of the purchaser from him, remains in the vendor.

3. A statute of limitations barring suits for the recovery of real estate after a certain lapse of time does not apply to a case like that above described. The vendee, or the purchaser from him, stands in the relation of a trustee to the vendor for the unpaid purchase-money (or, as the matter is looked upon in some States, stands in that of a mortgagee) against whom the statute does not run.

4. If the notes are not paid, the vendor may apply by bill in equity against the vendee and the purchaser from him, tendering a good deed, and ask that they pay the purchase-money at short date or be foreclosed from setting up any right to the land, and that it be sold and the proceeds applied to paying the purchase-money.

5. Where confessedly the title of a party claiming land as owner, and who has agreed to sell, is denied by the vendee and a dispute has taken place about title, so that a tender of a deed would be a useless ceremony, costs on a bill filed to enforce the payment of the purchase-money must abide the result of the suit.

6. If the purchaser from the vendee be dead, leaving a widow his executrix, and heirs-at-law to whom with her his real estate has descended, they ought to be made parties defendant to any bill to foreclose.

APPEAL from the Circuit Court for the Western District of Arkansas.

The case was thus:

A statute of limitation in Arkansas, passed January 4th, 1851,* enacts that no suit at law or in equity for the recovery of real estate shall be brought after the lapse of seven years from the time when the cause of action accrued.

This statute being in force, Lewis, in November, 1853, agreed to sell to Hawkins certain real estate; Hawkins, for the consideration-money giving to Lewis his two promissory notes, each for the sum of $500, payable, one on the 1st of February, 1855, and the other on the 1st of February, 1856, and Lewis at the same time giving to Hawkins his bond in the penal sum of $2000, binding him, Lewis, upon the payment of the two notes to Hawkins, to convey in fee simple the premises so sold.

It did not appear that this bond authorized Hawkins to take possession of the property sold, or that he did so.

* Gould's Digest, chapter 106, § 2.

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Statement of the case.

In October, 1855, Hawkins sold and conveyed the land to one Hamiter; Hamiter, as a part of the consideration, assuming the payment of the notes which Hawkins had given to Lewis. Hamiter went into possession of the premises, and occupied them, with his family, until May, 1866, when he died, leaving a widow and nine children his heirs-at-law, and whom, with the widow, he made his devisees; the widow being made his executrix. The widow and her family had occupied the premises ever since Hamiter's, the husband's, death.

Nothing having been paid by any one upon the two notes, Lewis sued Hawkins, and on the 11th of August, 1860, recovered a judgment against him for $1201. The judgment remaining also wholly unpaid, Lewis filed, in August, 1871, a bill against Hawkins and the widow and executrix of Hamiter (his children and heirs-at-law not, however, being made parties), to enforce the payment of the notes and interest against the land.

The bill alleged that the complainant had always been and still was willing to perform the agreement on his part, and offered to execute and bring into court, to be delivered to the defendants, or either of them lawfully entitled thereto, a deed conveying the land in fee simple in accordance with the condition of the title-bond, on being paid the purchase-money due, with the interest. And alleged further that the complainant, since the second note fell due, had duly tendered to Hawkins a deed of conveyance, and demanded the payment of the amount due for the purchase-money thereof; but that Hawkins refused to accept the deed and to pay the purchase-money.

The prayer of the bill was that the equity of redemption of the defendants, and of all persons claiming through them or either of them, might be barred and foreclosed, and that the defendants be compelled to pay to the complainant the amount due to him for the land with interest; the complainant being ready and willing to execute and deliver to the defendant Hawkins, or his assigns, a deed for the land in fee simple with warranty of title; and that in case the

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said defendants would not pay the said purchase-money by a short day to be named, the premises might be sold and the proceeds applied to the payment of the decree to be rendered for the purchase-money.

Both defendants answered.

The answer of Hawkins denied that any tender of a deed as alleged in the bill had been made to him, and he set up as a defence his discharge in bankruptcy.

Mrs. Hamiter, the widow, relied upon the already-mentioned statute of limitations of Arkansas, which bars suits at law and in equity for real estate after the lapse of seven years from the time the cause of action accrued.

The depositions of both Lewis and Hawkins were taken. The former stated that the tender alleged in the bill had been made; the latter that no such tender had ever been made.

The court below dismissed the bill for want of equity, and from that, its decree, Lewis, the complainant, brought the case here.

Mr. A. H. Garland, for the appellant:

There is nothing in the record showing upon what grounds the bill was dismissed.

If the court based its decision upon the question of tender of a deed, it was error.

If upon the statute of limitations, it was error equally.

There are no other points upon which it is possible to have founded the decree.

By the terms of the contract, as evidenced by the title-bond, the purchase-money was to have been paid before a deed was made. The notes were due and payable at a specified time, and if not paid then there was a default, and Lewis had his right of action at once. Besides the tenor of the notes, the title-bond made payment a condition precedent, and no tender of a deed was necessary at all.*

If, however, it were necessary to tender a deed, a failure

* 2 Parsons on Contracts, 41, ed. 1858; Ib 187-189.

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to do so would be no cause of dismissal, but only a reason for taxing Lewis for costs of suit, as he might possibly have avoided a suit by tendering the deed. But to avoid all this, we have the fact that Lewis could not know who claimed the land after Hawkins, nor to whom to make the deed. He avers, however, his readiness to make the deed to the person entitled to it under the order and decree of the court, and this was all he could do.* There can be nothing, then, in the question of tender.

When Hawkins purchased the land and took a title-bond from Lewis, the parties stood towards each other just as if Lewis had made a deed to Hawkins, and Hawkins had mortgaged back the land to secure the payment of the purchase-money.† And this proceeding is simply an attempt to foreclose a mortgage. It is a proceeding *in rem* to subject the land to the payment of money, of the non-payment of which Hawkins's vendee had due notice. This being true, the plea of the statute of limitations is of no effect. This defence is set up by analogy to the statute bar to the remedy at law; but it is well settled that the statute of limitations which would bar a debt secured by mortgage will not bar the remedy upon the mortgage, because the mortgage has a legal import more extensive than the mere evidence of the debt.‡

Even if the *judgment* on these notes had been barred, yet Lewis could recur to his mortgage and ask for its enforcement.§

Indeed, it is not seen how Hawkins and his vendee, holding by consent of Lewis, and necessarily with full knowledge of the non-payment of the purchase-money, could plead limitations at all, whether in an action to recover the land or to make it pay the debt.

* Turner v. Lassiter, 27 Arkansas, 662; 1 Leading Cases in Equity, Hare & Wallace's notes, 270 *et seq.*

† Smith v. Robinson, 18 Arkansas, 534; Moore v. Anders, 14 Id. 633; Harris v. King, 16 Id. 126.

‡ Trotter v. Erwin, 27 Mississippi, 772; Bush v. Cooper, 26 Id. 599; Thayer v. Mann, 19 Pickering, 535.

§ Bank v. Guttschlick, 14 Peters, 19.

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Argument against the lien.

Messrs. Pike and Johnson, contra, for the widow:

1st. The bond for title did not convey to Hawkins any *legal* interest in the land, but at most an equity, with right of possession.

2d. On failure of Hawkins to pay the notes the bond was forfeited, and Lewis had a right to retake the possession.

3d. The estate in fee being in Lewis, how can he have a lien? The man cannot have a lien on that which is his own?

4th. The first note fell due on the 1st of February, 1855. Upon that default Lewis was entitled to retake possession. This suit was instituted by him on the 31st of August, 1871, eleven years after he obtained judgment. The statute of limitations then barred any action by him, in law or equity, for possession. Having lost the right to regain possession, he cannot avoid the statute bar by setting up a lien for the purchase-money, and asking to have a decree for money already in judgment, and *a sale of his own land* to satisfy such decree.

5th. Suppose such sale were decreed. How would the purchaser have legal title, when neither Hawkins nor Hamiter ever had any?

6th. Assume that Lewis had once, on the 1st of February, 1855, a right to sue on the notes, to bring ejectment or to foreclose, or to do all at once, yet the limitation prescribed by the act of January 4th, 1851, applied to the case and barred an ejectment or suit to foreclose at the end of seven years thereafter. Under the statute the right to foreclose was barred long before this suit was brought.

7th. It so appears on the face of the bill, and there is no averment of any fact to prevent the bar applying. The defendants could have availed themselves of the statutory bar by demurrer.

8th. The bill, therefore, did not make a case in which the plaintiff was entitled to relief or discovery, and therefore it was properly dismissed for want of equity, *i. e.*, for want of right to equitable relief.

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Opinion of the court.

Mr. Justice SWAYNE delivered the opinion of the court.

Upon the execution of the notes and the title-bond between Lewis and Hawkins, Lewis held the legal title as trustee for Hawkins; and Hawkins was a trustee for Lewis as to the purchase-money. Hawkins was *cestui que trust* as to the former and Lewis as to the latter.* The seller under such circumstances has a vendor's lien, which is certainly not impaired by withholding the conveyance. The equitable estate of the vendee is alienable, descendible, and devisable in like manner as real estate held by a legal title. The securities for the purchase-money are personalty, and in the event of the death of the vendor, go to his personal representative.† It does not appear that the title-bond authorized Hawkins to take possession, or that he did so. If there were no such authority, and he entered into possession, he held as a licensee or tenant at will.‡ The vendee cannot in such cases dispute the title of his vendor any more than the lessee can dispute that of his lessor.§ Any other person coming into possession under the vendee, either with his consent or as an intruder, is bound by a like estoppel.‖ Hamiter, having bought and assumed the payment of the purchase-money stipulated to be paid by Hawkins, took the property subject to the same liabilities, legal and equitable, to which it was subject in the hands of Hawkins.¶

The discharge in bankruptcy released Hawkins from personal liability for his debt, but the statute of limitations cannot avail to protect the land from the vendor's lien upon it,

* 1 Story's Equity, § 789; 2 Id. § 1212; 1 Sugden on Vendors and Purchasers, 175; Swartwout v. Burr, 1 Barbour, 499; Champion v. Brown, 6 Johnson's Chancery, 402.

† 2 Story's Equity, § 1212.

‡ Suffern v. Townsend, 9 Johnson, 35; Dolittle v. Eddy, 7 Barbour, 75.

§ Whiteside v. Jackson, 1 Wendell, 422; Hamilton v. Taylor, 1 Littell's Select Cases, 444.

‖ Jackson v. Walker, 7 Cowan, 637.

¶ 1 Story's Equity, § 789; 1 Sugden on Vendors and Purchasers (Perkins's ed.), 175; Champion v. Brown, 6 Johnson's Chancery, 402; Muldrow's Executors v. Muldrow's Heirs, 2 Dana, 387; 2 Harris & Johnson, 64; Shipman v. Cook 1 Green's Chancery, 254.

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for the purchase-money which Hawkins agreed to pay, and which Hamiter, when he bought the land, assumed and agreed to pay for him.

We have already shown that as between Lewis and Hawkins there was a trust which embraced the purchase-money and fastened itself upon the land. The debt did not affect his assignee personally, but as we have shown also it continued to bind the land in all respects as if the transfer had not been made. The trust was an express one. Its terms and purposes were evinced by the title-bond, and the promissory notes to which that instrument referred. "As between trustee and *cestui que trust*, in the case of an express trust, the statute of limitation has no application, and no length of time is a bar. Accounts have been decreed against trustees extending over periods of thirty, forty, and even fifty years. The relations and privity between trustee and *cestui que trust* are such that the possession of one is the possession of the other, and there can be no adverse possession during the continuance of the relation. . . . A *cestui que trust* cannot set up the statute against his *co-cestui que trust*, nor against his trustee. These rules apply in all cases of express trusts."*

"As between trustees and *cestui que trust*, an express trust, constituted by the act of the parties themselves, will not be barred by any length of time, for in such cases there is no adverse possession, the possession of the trustee being the possession of the *cestui que trust*."†

The same principle applies where the *cestui que trust* is in possession. He is regarded as a tenant at will to the trustee. "Therefore, until this tenancy is determined there can be no adverse possession between the parties."‡ The relation once established is presumed to continue, unless a distinct denial, or acts, or a possession inconsistent with it are clearly shown.§

* Perry on Trusts, § 863. † Hill on Trustees, 264*. ‡ Id. 266*.

§ Whiting v. Whiting, 4 Gray, 236, Creigh's Heirs v. Henson, 10 Grattan, 231; Spickerneln v. Hotham, Kay, 669; Garard v. Tuck, 65 English Common Law, 249; Same Case, 8 Manning, Granger & Scott, 231; Decouche v. Savetier, 3 Johnson's Chancery Reports, 190; Anstice v. Brown, 3 Paige, 448; Kane v. Bloodgood, 7 Johnson's Chancery, 90.

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In many of the cases it is held that the lien of the vendor under the circumstances of this case is substantially a mortgage.* It is well settled that the possession of the mortgagor is not adverse to that of the mortgagee. In the case last cited it is said that to apply the statute of limitations "would be like making the lapse of time the origin of title in the tenant against his landlord." That the remedy upon the bond, note, or simple contract for the purchase-money is barred in cases like this, in no wise affects the right to proceed in equity against the land. As in respect to mortgages, the lien will be presumed to have been satisfied after the lapse of twenty years from the maturity of the debt, but in both cases laches may be explained and the presumption repelled.† The principles upon which this opinion proceeds are distinctly recognized in *Harris* v. *King*.‡ That case alone would be decisive of the case before us. The considerations which apply where the vendor in such cases resorts to an action of ejectment were examined by this court in *Burnett* v. *Caldwell*.§

The bill avers the tender of a deed by the complainant to Hawkins before the bill was filed. The answer of Hawkins denies the allegation. The testimony of Lewis sustains the bill; that of Hawkins the answer. The averment is not established. Except as to the costs the point is of no significance. If the tender of a deed had been properly made, and there had been no unjustifiable resistance to the taking of the decree by the complainant, to which he is entitled, he would have been required to pay all the costs. There being a contest, and it appearing that a tender would have been without effect, the costs must abide the result of the litigation.‖

There is manifest error in the decree, but the bill is defective in not making the heirs-at-law of Hamiter parties,

* Lingan v. Henderson, 1 Bland's Chancery, 236; Moreton v. Harrison, Id. 491; Relfe v. Relfe, 34 Alabama, 504.

† Moreton v. Harrison, *supra*. ‡ 16 Arkansas, 122. § 9 Wallace, 290.

‖ Keisselbrack v. Livingston, 4 Johnson's Chancery, 144; Hanson v. Lake, 2 Yeunge & Collier, 328.

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unless there is some statutory provision of the State of Arkansas which obviates this objection.

If necessary the bill can be amended in the court below.

DECREE REVERSED, and the cause REMANDED with directions to proceed

IN CONFORMITY WITH THIS OPINION.

RAY v. NORSEWORTHY.

Although District Courts of the United States, sitting in bankruptcy, have power to order a sale of the real estate of the bankrupt which he has mortgaged, in such a way as to discharge it of all liens, and although as a general thing, if they order a sale so that the purchaser shall take a title so discharged the purchaser will have a title wholly unincumbered, yet to pass in this way an unincumbered title of property previously mortgaged, it is indispensable that the mortgagee have notice of the purpose of the court to make such an order; or that in some other way he have had the power to be heard, in order that he may show why the sale should not have the effect of discharging his lien. And if a sale be made without any notice to him, his mortgage is not discharged.

ERROR to the Supreme Court of Louisiana.

The case was thus:

The first section of the Bankrupt Act enacts:

"That the several District Courts be and hereby are constituted courts of bankruptcy. . . . And the jurisdiction hereby conferred shall extend to all cases and controversies arising between the bankrupt and any creditor or creditors who shall claim any debt or demand under the bankruptcy; to the collection of all the assets of the bankrupt; to the ascertainment and *liquidation of the liens and other specific claims thereon;* to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution of the assets among all the creditors."

The twentieth section enacts:

"When a creditor has a mortgage or pledge of real or personal

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property, or a lien thereon for securing the payment of a debt owing to him from the bankrupt, he shall be admitted as a creditor only for the balance of a debt after deducting the value of such property, to be ascertained by agreement between him and the assignee, or by a sale thereof, to be made *in such manner as the court shall direct.*"

With these provisions of the Bankrupt Act in force, W. A. Parks owning a plantation in Louisiana, sold the same to one Brigham, who, in consideration of the sale, gave his note for $11,666.66 to Parks, and to secure the note gave also what is called, in Louisiana, "a special mortgage with vendor's privilege;" a sort of security apparently like a common-law mortgage for purchase-money.

Parks sold for value this mortgage with its privileges to one Norseworthy (the transfer being duly recorded), and soon afterwards died. Brigham, the purchaser of the land, was declared bankrupt, and his assignee, one Norton, filed a petition in the District Court of the United States at New Orleans, setting forth certain facts, though exactly what facts—as the petition itself was not produced—did not appear. So far as might be inferred from a recital and order hereinafter quoted, made upon the petition, it rather seemed that the petition represented that Parks had owned the land and sold it to Brigham, taking the mortgage, &c.; that Brigham was now bankrupt, and that he, Norton, was his assignee; that it was necessary to sell the land to pay the debts of the bankrupt; and praying an order of sale and power to apply the proceeds to paying, in discharge of special mortgages, to one J. D. Denegre, $7091; to Parks, $11,666.66; and to one R. Nugent, $2044. Parks had, at this time, been dead for more than a year, and his estate had been sold. Denegre too was dead. Norseworthy lived in Texas, several hundred miles from New Orleans. Whether the fact of his interest in the mortgage originally owned by Parks was in any way stated, or indeed whether his name was mentioned in the petition in any way did not appear. But it appeared that a notice of the sale, intended to be a notice to him, had been sent through the mail by the assignee in bankruptcy,

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to a person supposed by the said assignee to be Norseworthy's attorney, and to represent him, but who, in fact, did not represent him at all in any way. Neither did it appear what rule was made or what return had been made by the marshal.

Although, as above said, the petition itself was not produced, nor the rule, nor the marshal's return, the following proceedings upon the petition in the court of bankruptcy were produced:

"The petition and rule filed by the assignee, came up, Mr. H. D. Stone, *for the assignee;* and it appearing to the satisfaction of the court that the service required by law has been duly made, and that *the facts set forth in the petition are true;* it is ordered that the prayer of the petition be granted and the rule be made absolute; that the assignee be authorized to sell the bankrupt's property following, to wit:"

[Here followed a description of the property mortgaged.]

"It is further ordered that said assignee be also authorized to cancel all mortgages, liens, judgments, and incumbrances resting on said property, and particularly those in favor of the estate of J. D. Denegre for $7091, being a special mortgage; the special mortgage and vendor's privilege in favor of W. A. Parks, for $11,666.66, and the special one in favor of R. Nugent for $2044, reserving to said parties and to all other persons in interest all the rights in law to the proceeds according to their rank and priority."

The assignee, in pursuance of the already-quoted order, sold the land at public sale, and it came finally in the hands of one Ray.

Norseworthy now sought, in one of the State courts of Louisiana and by some of the proceedings usual in the civil-law practice, or in the code of the State just named, to subject the land to the payment of his mortgage for $11,666.66.

To establish his case, he produced his mortgage and transfer.

The other side, to show a discharge of the mortgage, put in evidence the recital and order of the District Court, quoted just above, but did not produce or put in evidence

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the petition on which the order and proceedings were had, nor the rule, nor the marshal's return.

One of the issues in the court in which Norseworthy made his proceeding was, whether Norseworthy received a proper notice or was legally made a party to the proceeding under which the assignee attempted to sell the property free of his mortgage.

That court held that he had not received a proper notice, and that his rights were thus unaffected by the sale. The Supreme Court of the State was of the same opinion, and from its judgment made on that view the case was now here.

It was admitted in this court, on both sides, to be plain, alike under the first and the twentieth sections above quoted of the Bankrupt Act, that under proper proceedings—which, of course, included a notice properly given to parties in interest—the District Court had authority to order the sale of the property free of liens. So that the only questions in the case were: 1st. Whether Norseworthy was to be taken as having received proper notice, and if not, 2d. Whether the want of it was fatal to the discharge of his lien.

Messrs. Durant and Horner, for the plaintiff in error:

The Supreme Court of Louisiana seeks to withdraw this case from the operation of the admitted rule that the District Court sitting in bankruptcy has authority to order the sale of the property in question free of prior incumbrances, on the ground that the mortgage-creditor, Norseworthy, did not receive proper notice, and was not legally made a party to the proceedings resulting in the order to sell the property in question free from his prior mortgage.

The answers to this are manifold:

1st. The fact that Norseworthy was not a party to the rule is not sufficiently proved, and on him was the burden to adduce sufficient proof. The recital in the order of sale is, "that it appears to the satisfaction of the court that the service required by law has been duly made." If by law Norseworthy was required to be served, it is here recited that he was served, and duly served.

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Argument in favor of the discharge of the lien.

2d. Assuming, however, that Norseworthy was a stranger to the proceedings in bankruptcy, he could not annul them *collaterally*. The proceedings are *in rem* and all the world are parties.

The only question before the State court, which could legally be agitated, was the competency of the District Court of the United States for the Eastern District of Louisiana. This competency cannot be denied. The decision of a court of a peculiar and exclusive jurisdiction must be completely binding upon the judgment of every other court in which the same subject-matter comes incidentally in controversy.*

Norseworthy's relief, therefore, was to be found in the national court. A rule for a new trial, an appeal, an action of nullity, &c., &c., even an application to the extended supervisory jurisdiction of the Circuit Court of the United States, under the national Bankrupt law, were all open to him *there*, and *not elsewhere*. In a more important case than this it was decided that the State of Texas was bound to appeal from an order of court directing a receiver to sue, and could not contest his right to do so *collaterally*.†

3d. The discharge in bankruptcy freed Brigham from all liability for the debt due Norseworthy. The debt was extinguished, and under Louisiana law all the concomitants of it perished. There could be no hypothecary right remaining in Norseworthy after the sale of the property by the bankrupt court and the final discharge of the bankrupt.

Messrs. E. T. Merrick and G. W. Race, contra:

1. An issue was formed on the question of fact whether Norseworthy was rightly served, and was decided against the plaintiff in error by both the inferior State court and by the Supreme Court of Louisiana.

And it is this question of *fact* which is brought here by the writ of error, and this court is requested to re-examine

* Gelston v. Hoyt, 3 Wheaton, 315.

† Davis v. Gray, 16 Wallace, 219.

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Argument in favor of the discharge of the lien.

the proofs and testimony and find the facts differently from the courts having jurisdiction of them. This it will not do.

2. If the *petition* had been put in evidence by the assignee in bankruptcy, and it had appeared that Norseworthy was a party named in it, there might be some value in the recital subsequently made, that it appeared to the satisfaction of the court that service had been made. But he puts in evidence the recital and the order made on the petition, but withholds the petition itself, the rule, and the marshal's return. The inference is irresistible that Norseworthy's title nowhere appears in it. Of what worth then is the recital? What is put in evidence, if it shows notice at all and to anybody, fails to show to whom the notice was. It may be to any one man as well as to any other.

Parks was dead, and his property sold in 1868. It cannot, therefore, be pretended that Norseworthy could be bound by any imaginary notice to Parks, who had by public act sold the mortgage in his lifetime.

The proofs adduced on the trial in the lower court by the plaintiff and passed upon by the District and Supreme Courts show that instead of serving a summons, citation, or notice on Norseworthy (the holder of the mortgage), the notice was sent to a person who was not his attorney, nor authorized to accept service for him.

This is not due process of law. A party who never appeared in the bankrupt court, whose rights were of record in the public archives of the recorder's office, was not to be divested of real rights by chance notices served on third parties not representing him, through the mail.

The bankrupt court being one of special and limited jurisdiction, it was incumbent that those who pretend to have divested the legal rights of third parties, should clearly show by the record such formal proceedings as the law requires, and such service of process as was needed for the exercise of such jurisdiction.

The discharge of the original mortgagor from all his debts would not affect a lien on his estate, and especially when the estate on which the lien was had passed to another owner.

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Mr. Justice CLIFFORD delivered the opinion of the court.

The theory of the plaintiff in error is that the title of the petitioners under the first mortgage and privilege was extinguished by the decree of the bankrupt court, and that the plaintiff acquired an absolute title to the land from the assignee in bankruptcy, discharged of all prior incumbrances and privileges.

1. Jurisdiction of the bankrupt courts extends to all cases and controversies arising between the bankrupt and any creditors who shall claim any debt or demand under the bankruptcy, to the collection of all the assets of the bankrupt, to the ascertainment and liquidation of the liens and other specific claims thereon, to the adjustment of the various priorities and conflicting interests of all parties, and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties and the due administration of the assets among all the creditors.*

Powers of like kind were conferred upon the bankrupt courts by the former Bankrupt Act, and the provision in that regard is expressed in substantially the same terms.†

Cases involving the construction of that provision were several times removed into this court for re-examination, in all of which it was held that the power conferred extended to all cases where the rights, claims, and property of the bankrupt, or those of his assignee, are concerned, because they were matters arising under the act and were necessarily involved in the due administration and settlement of the bankrupt's estate.‡

So where the bankrupt court ordered the mortgaged premises to be sold, and directed that the mortgages should be cancelled and that the property should be sold free from incumbrance, rendering to the parties interested their respective priorities in the proceeds, this court decided that the bankrupt court did not exceed their jurisdiction, and affirmed their action.§

* 14 Stat. at Large, 517. † 5 Id. 445.

‡ Ex parte Christy, 3 Howard, 313; Norton v. Boyd, Ib. 427.

§ Houston v. City Bank, 6 Howard, 504.

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Opinion of the court.

Corresponding decisions were made by the State court in construing the former Bankrupt Act, which are equally applicable to cases like the one before the court.*

Even if, by the true construction of the first section of the act, any doubt could arise as to the power of the bankrupt court to authorize such a sale, it has been well held that it may be derived from the twentieth section of the same act. By that section it is provided that a creditor having a mortgage or pledge of real or personal property, or a lien thereon, for the security of a debt, shall be admitted as a creditor *only* for the balance of the debt, deducting the value of such property to be ascertained by agreement between him and the assignee, *or by sale thereof, to be made in such manner as the court may direct.*†

Beyond all doubt the property of a bankrupt may, in a proper case, be sold by order of the bankrupt court free of incumbrance, but it is equally clear that in order that such a proceeding may be regular and valid the assignee must apply to the bankrupt court for an order to that effect, and must set forth the facts and circumstances which it is supposed justify the application, that the judge may decide whether or not the application shall be granted. Secured creditors in such a proceeding must have due opportunity to defend their interests and consequently must be properly notified and summoned to appear for that purpose.‡

None of these conditions were fulfilled in this case. Instead of that the State court finds that the petitioner was never properly notified and that he was not made a party to the proceeding resulting in the order to sell the property in question free of his prior mortgage, and it was upon that ground that the State court decided that his rights were unaffected by the proceedings.

Concede to the fullest extent the powers of the bankrupt

* Clark v. Rosenda, 5 Robinson (Louisiana), 89; Conrad v. Prieur, Ib. 54; Lewis v. Fisk, 6 Id. 162.

† In re Kirtland, 10 Blatchford, 515.

‡ Foster v. Ames, 1 Lowell, 816; Willard v. Brigham, 25 Louisiana Annual, 601.

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court to do everything specified in the Bankrupt Act, still it is clear that the mortgage and privilege of the petitioner could not be cancelled and displaced without notice nor without an opportunity to be heard, nor could the proceeds of the sale be adjudged to a junior mortgagee with or without notice, unless for some cause other than what is disclosed in the record.* Notice in some form must be given in all cases, else the judgment, order, or decree will not conclude the party whose rights of property would otherwise be divested by the proceeding.†

No man is to be condemned without the opportunity of making a defence, or to have his property taken from him by a judicial sentence without the privilege of showing, if he can, that the pretext for doing it is unfounded. Every person, as this court said in the case of *The Mary*,‡ may make himself a party to an admiralty proceeding and appeal from the sentence, but notice of the controversy is necessary in order to enable him to become a party.§

Authorities to the same effect are very numerous, nor is there any well considered case which gives any support to the proposition that the judgment, order, sentence, or decree of a court disposing of property subject to conflicting claims will affect the rights of any one not a party to the proceeding and who was never in any way notified of the pendency of the proceeding.‖

Such a sale made in such a manner without notice may, under some circumstances, be set aside as violating the rights of the prior mortgagee, but the mortgagee may, if he

* Peychaud v. Bank, 21 Louisiana Annual, 202.

† The Lottawanna, 20 Wallace, 201; Nations v. Johnson, 24 Howard, 205; Harris v. Hardeman, 14 Id. 339; Borden v. Fitch, 15 Johnson, 141; Buchanan v. Rucker, 9 East, 192.

‡ 9 Cranch, 144.

§ Webster v. Reid, 11 Howard, 460; Boswell's Lessee v. Otis, 9 Id. 350, Oakley v. Aspinwall, 4 Comstock, 515.

‖ Weed v. Weed, 25 Connecticut, 337; Means v. Means, 42 Illinois, 50; Hill v. Hoover, 5 Wisconsin, 386; Wallis v. Thomas, 7 Vesey, 292; Water Power Co. v. Pillsbury, 60 Maine, 427; Lane v. Wheless, 46 Mississippi, 666: Hettrick v. Wilson, 12 Ohio State, 136; Vallejo v. Green, 16 California, 160

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sees fit, affirm the sale and proceed to enforce his priority against the proceeds of the sale, which is the real nature of the proceedings in this case.*

Authority is doubtless possessed by the assignee to sell the property of the bankrupt, whether the same is or is not incumbered, but when he sells incumbered property without any special order from the court he sells the same subject to any and all lawful incumbrances, and can convey no better or higher interest than the bankrupt could have done. In such a case it will be taken for granted that the assignee sold *only* such right or title to the property as was vested in him as the representative of the bankrupt, and therefore that he sold it subject to the incumbrances.

Such sales may be made without notice to the secured creditor, but if the assignee desires to sell the property free of incumbrances he must obtain authority from the bankrupt court, and must see to it that all the creditors having liens on the property are duly notified, and that they have opportunity to adopt proper measures to protect their interests.†

DECREE AFFIRMED.

Mr. Justice BRADLEY did not sit in this case.

RANDALL v. KREIGER.

A. and wife, residents of the State of New York, executed a power of attorney to B. to sell lands in Minnesota Territory of which A., the husband, was seized. The power was executed and acknowledged by both parties, the wife undergoing such separate examination as by the laws of New York makes valid the execution of deeds by a *feme covert*. At the time when this power of attorney was given there was no law of the Territory authorizing such an instrument to be executed by the wife or the attorney

* Livaudais v. Livaudais, 8 Louisiana Annual, 454.

† King v. Bowman, 24 Louisiana Annual, 506; Bump on Bankruptcy (7th ed.), 156; In re Kirtland, 10 Blatchford, 515.

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to convey under it. B., professing to act for the two parties, sold and conveyed a piece of the land, then worth $3000, with general warranty, to C., for that sum, and A. received the money. The legislature of Minnesota subsequently passed an act by which it was enacted that "all deeds of conveyance of any lands in the Territory, whether *heretofore* or hereafter made, under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made by the original parties." The husband and wife afterwards revoked the power. The husband died leaving a large estate composed entirely of personalty, the whole of which he gave to his wife. The wife now brought suit for dower in the land sold by B. as attorney for her husband and herself. *Held*, that the power of attorney was validated by the curative act, which the court, adverting to the fact that the husband had received the purchase-money for the tract, and that it had become part of his estate, and that the whole of it on his death passed to the wife, declares had a strong natural equity at its root, and accomplished that which a court of equity would have failed to decree against the wife, only because it would be prevented by the unbending law as to *feme coverts* in such cases.

APPEAL from the Circuit Court for the District of Minnesota.

Mrs. Sarah Randall, whose husband, John Randall, had been seized in fee during their marriage of a piece of land in Minnesota, brought suit, her husband being now dead, to have dower in the land.

The case was thus:

In May, 1849, the said John Randall, being seized as abovesaid in fee of the land, he and his wife, then, as always before and afterwards, resident in the State of New York, executed in the form proper to pass a *feme covert's* interest in lands in that State, a power of attorney to a person in Minnesota, by which the latter was authorized to sell and convey the land in question, as also other tracts. The power was duly recorded in Minnesota. At the time when this power was given it seemed that there was no mode prescribed by statute in Minnesota by which a non-resident *feme covert* could execute a power under seal to pass her interest in real estate.

In January, 1855, there being still apparently no statute in Minnesota of the sort just mentioned, the attorney, professing to act in behalf of Randall and his wife, sold and

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conveyed with general warranty the land, in consideration of $3000, to one Kreiger. The deed to Kreiger was in conformity to the local law of Minnesota, and the sum for which he purchased the land—one apparently fair—was paid to Randall, the husband.

On the 24th of February, 1857, the legislature of Minnesota, then still a Territory of the United States, passed an act in these words:*

"A husband and wife may convey by their lawful agent or attorney any estate or interest in any lands, situate in this Territory; and *all* deeds of conveyance of any such lands, whether *heretofore* or hereafter made, under a joint power of attorney from the husband and wife, shall be as binding and have the same effect as if made and executed by the original parties."

In May, 1859, Randall and his wife by an instrument duly executed revoked the power of attorney made in 1849. Randall himself soon afterwards died, leaving to his wife his entire estate; the same consisting wholly of personalty, and being estimated as worth between $100,000 and $200,000. She had already received of it more than $50,000.

The value of the property now was $7000, independently of improvements put upon it after the conveyance.

The claim of the widow was resisted on several grounds; among them that any defect in her acknowledgment had been remedied by the curative act of 1857; that the purchase-money having been paid to her husband, and having passed to and been accepted by her, she was estopped while still holding it to claim dower in addition; that she had elected to take the provision made by her husband's will, and which was inconsistent with the claim to dower now set up, &c., &c.

But the only question considered by the court, was the one whether the case fell within the curative part of the above-quoted act of 1857; the concluding portion which enacts that all deeds of conveyance in the Territory made *prior* to the passage of the act under a joint power of attorney, from

* Laws of Minnesota for 1857, p. 29.

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the husband and wife, shall be as binding and have the same effect as if made by the original party.

The court below (Dillon, J.), said:

"I am of opinion that the case falls within the curative or remedial provisions of the act of 1857, and that this act, having been passed before the right to dower became consummated by the death of the husband, is a valid exercise of legislative power.

"Until the death of the husband the right to dower is inchoate and contingent. It becomes consummate only upon that event. In my opinion, the better view is that while the right remains inchoate it is as respects the wife under the absolute control of the legislature, which may, by general enactments, change, abridge, or even destroy it, as its judgment may dictate.* 'So,' says Wright, C. J., in *Lucas* v. *Sawyer*, just cited, 'the legislature may declare what acts of the wife shall amount to a relinquishment of her right of dower, or that her deed shall be effectual to bar the same.' Again he says: 'In measuring her rights we look to the law in force at the time of the husband's death, for it is this event which ripens or makes consummate the prior right, which, so long as it rested upon the marriage and seizure, was inchoate only. If there was no law in force at that time giving her the right, then it is extinguished. She cannot take under a law repealed prior to that time; and taking a law then existing, she must take it with its restrictions and limitations.'

"It was competent, therefore, for the legislature to say as respects all inchoate rights of dower, as it did say by the act of 1857, that deeds executed under a joint power of attorney from the husband and wife 'shall be binding;' and if binding, the claim of the wife here to dower is barred, for she joined in the power of attorney under which the deed was made.

"Of the constitutionality of the enactment there remains no question after the repeated decisions of the Supreme Court of the United States."†

Judgment being entered on this view, the widow brought the case here on appeal.

* Lucas v. Sawyer, 17 Iowa, 517, 521.

† Satterlee v. Matthewson, 2 Peters, 380; Watson v. Mercer, 8 Id. 88; and see 2 Scribner on Dower, 344–366; Cooley, Constitutional Limitations, 375–378.

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Argument in support of the right to dower.

Mr. Lorenzo Allis, for the appellant:

We will address ourselves to the point taken by the court below, that point being conclusive of the case if it is well taken:

1. The authorities all concur in asserting the doctrine that the statutory formalities of the execution and acknowledgment of a deed by a married woman, affecting her real estate, are a *part of the execution* of the deed, and not mere matters of *proof* or evidence of such execution;* and no court has gone farther in sustaining this doctrine than has this court. *Drury* v. *Foster*† applies the rule rigidly in a case so hard, that if the rule had been capable of relaxation it would have been there relaxed. As to the wife the instrument signed by her vested no power whatever in the so-called attorney. It was under that decision absolutely without effect for any purpose. It was not *her* act or deed. It was as to her no deed, no letter of attorney. The law is the same under a leading decision in Minnesota.‡

Where, indeed, there has been a *defective* conveyance or grant, the legislature may cure the defect, if the defect relates merely to the evidence, or proof of the conveyance. The legislature may also make a defective conveyance good between the parties to it, provided such defective conveyance amounts to a contract between the parties which a court of equity would enforce. But if the defective instrument, as here, under the authorities cited, is void; if it is neither a conveyance nor a contract to convey; if it grant or convey nothing, either in law or *in equity*, the legislature cannot make it valid and operative by any retrospective and curative act.§

The rule relative to retrospective acts made to cure defective conveyances is thus properly stated in *Chestnut* v. *Shane's Lessee*:‖

* Dodge v. Hollinshead, 6 Minnesota, 25; Kirk v. Dean, 2 Binney, 341; Thompson v. Morrow, 5 Sergeant & Rawle, 289; Drury v. Foster, 2 Wallace, 33.

† 2 Wallace, 33. ‡ Thompson et al. v. Morgan, 6 Minnesota, 295.

§ Meighen et al. v. Strong, Ib. 177, 181. ‖ 16 Ohio, 599.

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Argument in support of the right to dower.

"The act operates only upon that class of deeds where enough had been done to show that a court of chancery ought in each case to render a decree for a conveyance, assuming that the certificate was not such as the law required; and that when a title in equity was such that a court of chancery ought to interfere and decree a good legal title, it was within the power of the legislature to confirm the deed without subjecting an indefinite number to the useless expense of unnecessary litigation."

That is to say, it is competent for the legislature, by a retrospective act, to turn a mere equitable title into a good legal title.

But, a power of attorney, uncoupled with any interest in the attorney, is not a contract between the parties thereto. There is no such thing as a letter of attorney (uncoupled with any interest) which is good in equity but bad at law. There can be no such thing as an instrument which, though not in itself amounting to a letter of attorney, would be a *contract* for such letter, in the absence of any interest of the grantee therein. No retrospective and curative legislation, therefore, can, in the nature of things, be applicable to naked powers of attorney except such as relate to the *proofs* or *evidence* of their execution.

No court of equity will interfere to compel a married woman to ratify a void letter of attorney, nor to compel her to execute or complete a conveyance attempted to be made under a void letter of attorney. No court of equity would compel the plaintiff in this cause to recognize as her deed an instrument which she never executed. A court of equity would refuse to act for no reason, however, but that the estate equitable as well as legal still belongs to the woman; that she has never conveyed *any* thing; that the land is still her property wholly unaffected, even in conscience, by what she has done.

If this is the ground on which a court of equity acts, what power can there be in the legislature to act in an opposite way? The question involved is not one of *defective* execution or of the sufficiency of the *proofs* of execution. But of

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the *capacity* of the party to execute at all. How then can the legislature declare that acts which have been done by married women, when they had no capacity to do them, shall be valid acts?

We are aware that it has been held in some of the States, that curative legislation may be applied to defective deeds executed by married women affecting their own separate real estate. But in all these cases it will be found that statutes exist *enabling* a married woman to charge, convey, and make contracts affecting her separate real estate.

Hence courts of equity would compel her to complete and make good her defective conveyances, on the ground that these deeds, though bad as conveyances, were good as contracts which she was by law capable of making. If this would be the position she would occupy in a court of equity relative to her defective deeds, no doubt the legislature could to the same extent apply the remedy by retrospective and curative legislation.

But we do not see that a married woman could possibly stand in this position respecting her dower.

She cannot convey or assign her inchoate right of dower, though she can, by performing a certain act specified by statute, *bar* it. That is to say, by the performance of the specified act she is thereafter estopped from asserting her dower.*

Now, it is not perceived how the legislature can convert a past act which, when it was done, was not a matter of estoppel at all, into an estoppel.

Moreover, these subsequent curative acts cannot be made to affect this letter of attorney so far as the plaintiff is concerned, upon the assumption that they merely carry into effect her intentions. She was at the time, and continued to be until 1857, *incapable* of barring her dower by power of attorney. She could not, therefore, in reason, be held as *intending* to do what she was absolutely *without the capacity* to do.

* Malloney v. Horan, 49 New York, 117-120.

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2. This learned judge below, says:

"Until the death of the husband the right to dower is inchoate, and contingent. It becomes consummate only upon that event. In my opinion the better view is that while the right remains inchoate, it is, as respects the wife, under the absolute control of the legislature, which may, by *general enactment*, change, abridge, or even destroy it, as its judgment may dictate."

Concede that this is a correct statement of the law. But *is* the act of the 24th February, 1857, a "general enactment," changing, abridging, or destroying the inchoate right of dower of married women? It does not purport to be such an act. And it does not have any effect of such an act even under the construction given it by the learned judge below. It is an act which, at best, selects out of all the married women certain individuals, to wit, those who may have signed powers of attorney jointly with their husbands under which deeds of conveyance may have been made, and legislates in regard to these individuals by taking away or "destroying" their inchoate right of dower.

Such legislation is unconstitutional. The legislature cannot select from married women particular individuals, nor even a particular class of married women, and declare that such particular individuals, or particular class, shall have no dower in the lands of their husbands, while married women generally do have such dower.*

The plaintiff's right of dower in these lands was, then, not *taken away or "destroyed"* by the act of the 24th February, 1857.

3. But we do not assent to the doctrine that while the right of dower of married women remains inchoate it is under the absolute control of the legislature.

On the contrary, we think that the better opinion and reason are that the *concurrence of marriage and seisin* vests in the wife such a right in the lands of her husband as cannot be impaired by subsequent legislation.

* Cooley's Constitutional Limitations, pages 390–3, editior of 1868.

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Argument in support of the purchaser's right.

It is laid down in *Lawrence* v. *Miller*,* and we think upon abundant reason and authority, that the law of dower which existed at the time of the marriage and seisin of the husband, is the law of the contract which the husband and wife entered into by their marriage.

Mr. H. J. Horn, contra:

The ground on which the case is rested by the court below is a sound one. This is settled by numerous authorities,† and is the especial law for this court, in one of whose decisions, *Watson* v. *Mercer*,‡ it is said in terms:

"The decided weight of authority is in favor of the doctrine that the right to dower may at any time before the husband's death, be enlarged, abridged, or entirely taken away."

But the case need not be rested solely on that ground. There are other grounds independent of it, and like it conclusive.

1. The deed having been one with warranty, and the appellant being the sole legatee and devisee under the will of her husband, and having claimed under it, she cannot in equity be allowed to maintain what is in effect a suit against the estate of her husband, since if she recover her dower his warranty is thereby broken, and his estate liable on the covenants in the husband's deed.

The only effect of a recovery by the appellant in this suit would be to subject the respondent to the burden of instituting a suit in another State to compel the appellant to restore the value of what she might obtain herein, which would result in injustice and circuity of action.

2. The appellant being provided for in her husband's will,

* 2 Comstock, 250–252; and see Johnson v. Vandyke, 6 McLean, 423, 440–443; 4 Kent, 35, 36, 50 (marginal).

† Underwood v. Lilly, 10 Sergeant & Rawle, 97; Barnett v. Bareti, 15 Id. 72; Tate v. Stooltzfoos, 16 Id. 55; Chestnut v. Shane, 16 Ohio, 599; Matthewson v. Spencer, 3 Sneed, 513; Rainey v. Gordon, 6 Humphreys, 345; Noel v. Ewing, 9 Indiana, 37; Franz v. Harrow, 18 Id. 507; Galbraith v. Gray, 20 Id. 290; Lucas v Sawyer, 17 Iowa, 517; Moore v. City of New York, 4 Selden, 110; Satterlee v. Matthewson, 2 Peters, 380.

‡ 8 Peters, 88.

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and having accepted the provisions thereof by receiving $50,000 thereunder, has elected to take the provisions so made in preference to dower.*

3. The appellant being a non-resident could not have dower in land of which her husband did not die seized.†

4. The statutes in force in Minnesota in 1849, the time when the letter of attorney in question was executed, removed all disability from a *feme covert* in relation to releasing her dower. She was rendered competent alone, without joining her husband, to release her dower "in like manner as if she were sole."

[This point the learned counsel argued on citations of statutes governing Wisconsin Territory, and which he sought to show had been adopted in Minnesota.]

Mr. Justice SWAYNE delivered the opinion of the court.

There is no controversy between the parties as to the facts.

When the power of attorney was given there was no law of Minnesota authorizing such an instrument to be executed by husband or wife, or the attorney to convey under it.

The validity of the deed as respects Randall, the husband, is not questioned, but its efficacy as to the widow, the appellant in this case, is denied. Her claim to dower is resisted upon several grounds, and among them that the defect in the deed was remedied by the curative act of 1857.

We have found it necessary to consider only the point just stated.

It is not objected that the act of 1857, as regards its application to the present case, is in conflict with the constitution of the State. We have carefully examined that instrument and have found nothing bearing upon the subject.

* Section 18, chapter 49, p. 219, of Revised Statutes of Minnesota of 1851; Section 18, chapter 48, p. 362, of the General Statutes of Minnesota, 1866; Read v. Dickerman, 12 Pickering, 146, construing a statute in Massachusetts similar to the one above cited.

† Section 21, chapter 49, of the revision of 1851, p. 219; Section 21, of chapter 48, of the revision of 1866, p. 362; Pratt v. Tefft, 14 Michigan, 191, construing provisions the same with these in the law of Michigan.

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Nor was the act forbidden by the Constitution of the United States.

There is nothing in that instrument which prohibits the legislature of a State or Territory from exercising judicial functions, nor from passing an act which divests rights vested by law, provided its effect be not to impair the obligation of a contract. Contracts are not impaired but confirmed by curative statutes.*

Marriage is an institution founded upon mutual consent. That consent is a contract, but it is one *sui generis*. Its peculiarities are very marked. It supersedes all other contracts between the parties, and with certain exceptions it is inconsistent with the power to make any new ones. It may be entered into by persons under the age of lawful majority. It can be neither cancelled nor altered at the will of the parties upon any new consideration. The public will and policy controls their will. An entire failure of the power to fulfil by one of the parties, as in cases of permanent insanity, does not release the other from the pre-existing obligation. In view of the law it is still as binding as if the parties were as they were when the marriage was entered into. Perhaps the only element of a contract, in the ordinary acceptation of the term, that exists is that the consent of the parties is necessary to create the relation. It is the most important transaction of life. The happiness of those who assume its ties usually depends upon it more than upon anything else. An eminent writer has said it is the basis of the entire fabric of all civilized society.†

By the common law, where there was no ante-nuptial contract, certain incidents belonged to the relation.

Among them were the estate of tenant by the courtesy on the part of the husband if issue was born alive and he survived the wife, and on her part dower if she survived the husband. Dower by the common law was of three kinds: *Ad ostium ecclesiæ*, *Ex assensu patris*, and that which in the absence of the others the law prescribed. The two former

* Satterlee v. Matthewson, 2 Peters, 380; Watson v. Mercer, 8 Id. 110.

† Story's Conflict of Laws, § 109.

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were founded in contract. The latter was the creature of the law. Dower *Ad ostium ecclesiæ* and *Ex assensu patris* were abolished in England by a statute of the 3d and 4th William IV, ch. 105. The dower given by law is the only kind which has since existed in England, and it is believed to be the only kind which ever obtained in this country.

During the life of the husband the right is a mere expectancy or possibility. In that condition of things, the law-making power may deal with it as may be deemed proper. It is not a natural right. It is wholly given by law, and the power that gave it may increase, diminish, or otherwise alter it, or wholly take it away. It is upon the same footing with the expectancy of heirs, apparent or presumptive, before the death of the ancestor. Until that event occurs the law of descent and distribution may be moulded according to the will of the legislature.

Laws upon those subjects in such cases take effect at once, in all respects as if they had preceded the birth of such persons then living. Upon the death of the husband and the ancestor the rights of the widow and the heirs become fixed and vested. Thereafter their titles respectively rest upon the same foundation, and are protected by the same sanctions as other rights of property.*

The power of a legislature under the circumstances of this case to pass laws giving validity to past deeds which were before ineffectual is well settled.†

In *Watson* v. *Mercer*,‡ the title to the premises in controversy was originally in Margaret Mercer, the wife of James Mercer. For the purpose of transferring the title to her husband, they conveyed to a third person, who immediately conveyed to James Mercer. The deed of Mercer and wife bore date of the 30th of May, 1785. It was fatally defective

* 2 Scribner on Dower, pp. 5–8; Lawrence v. Miller, 1 Sandford's Supreme Court, 516; Same Case, 2 Comstock, 245; Noel and wife v. Ewing et al., 9 Indiana, 37; Lucas v. Sawyer, 17 Iowa, 517; White v. White, 5 Barbour, 474; Vartie v. Underwood and wife, 18 Id. 561.

† Sedwick on Statutory and Constitutional Law, 144, note; Cooley on Constitutional Limitations, 376.

‡ 8 Peters, 100.

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as to the wife in not having been acknowledged by her in conformity with the provision of the statute of Pennsylvania of 1770, touching the conveyance of real estate by *femes covert*. She died without issue. James Mercer died leaving children by a former marriage. After the death of both parties, her heirs sued his heirs in ejectment for the premises and recovered. The Supreme Court of the State affirmed the judgment. In 1826 the legislature passed an act which cured the defective acknowledgment of Mary Mercer, and gave the same validity to the deed as if it had been well executed originally on her part. The heirs of James Mercer thereupon sued her heirs and recovered back the same premises. This judgment was also affirmed by the Supreme Court of the State, and the judgment of affirmance was affirmed by this court. This case is conclusive of the one before us.*

To the objection that such laws violate vested rights of property it has been forcibly answered that there can be no vested right to do wrong. Claims contrary to justice and equity cannot be regarded as of that character. Consent to remedy the wrong is to be presumed. The only right taken away is the right dishonestly to repudiate an honest contract or conveyance to the injury of the other party. Even where no remedy could be had in the courts the vested right is usually unattended with the slightest equity.†

There is nothing in the record persuasive to any relaxation in favor of the appellant of the legal principles which, as we have shown, apply with fatal effect to her case. The curative act of 1857 has a strong natural equity at its root. It did for her what she attempted to do, intended to do, and doubtless believed she had done, and for doing which her husband was fully paid.

* See also Calder v. Bull, 3 Dallas, 388; Wilkinson v. Leland, 2 Peters, 627; Livingston v. Moore, 7 Id. 486; Kearney et al. v. Taylor et al., 15 Howard, 495; Chestnut v. Shane, 16 Ohio, 599; Goshorn v. Purcell, 11 Ohio State, 641; Lessee of Watson v. Bailey, 1 Binney, 477; Gibson v. Hibbard, 13 Michigan, 215; Foster v. Essex Bank, 16 Massachusetts, 245; State v. Newark 3 Dutcher, 197.

† Cooley's Constitutional Limitations, 378.

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The purchase-money for the lot became a part of his estate, and the entire estate was given to her at his death. Not satisfied with this she seeks to fasten her dower upon the property in question.

The act accomplished what a court of equity, if called upon, would have decreed promptly as to the husband, and would have failed to decree as to the wife only from the want of power. The unbending rule of law as to *femes covert* in such cases would have prevented it. The legislature thus did what right and justice demanded, and the act strongly commends itself to the conscience and approbation of the judicial mind.

DECREE AFFIRMED.

STICKNEY, ASSIGNEE, *v.* WILT.

1. A proceeding under the Bankrupt Act in which by petition in form, the assignee sets forth articulately that A., B., C., &c., claim liens against the bankrupt's estate, the validity of each of which liens he, the assignee, denies, and in which he prays that the parties setting up the liens may be made parties, and be required to answer, each of them, all his charges and allegations as made, and be compelled, each of them, to set forth and state in their respective answers the particulars and facts upon which their respective claims are based, and that on final hearing all questions and rights of each and all the parties may be ascertained and determined by the court, and that the petitioner be directed to sell the estate and distribute the proceeds; and in which the assignee prays that he "may have such other and further relief in the premises, and may be further directed in his duties as the nature of the case requires;" in which proceeding, the parties asserting the liens, answer in form, and the assignee replies in form, is a "case in equity" within the eighth section of the Bankrupt Act, which gives an *appeal* to the Circuit Court in all cases in equity; and is not a case for the general superintendence and jurisdiction by that court given in the second section of the act, in cases where no provision for the supervision of the Circuit Court is otherwise made.
2. The fact that a subpœna is not prayed for, does not change this view; the defendants voluntarily appearing.
3. If such a case be taken into the Circuit Court under this general superintending jurisdiction given by the said second section, it is wrongly

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taken. No jurisdiction exists there so to review the case. And no appeal lies to this court from the action of the Circuit Court made under such circumstances, to hear and determine the merits.

4. Where a case has been so taken, and the decision reversing the decree of the District Court is in favor of the party taking it, this court will reverse the judgment or decree of the court below, and remand the suit with directions to dismiss it.

5 But in the present case, where, owing to the lapse of time, the party who had the decision of the Circuit Court (reversing that of the District Court) against him, would be prevented from having, as matter of right, a review of the case by the Circuit Court on an appeal properly taken under the eighth section, this court thought it fitting to suggest that perhaps, on a proper application, the District Court would grant a review of the decree that *it* had rendered, which review, if granted, would lay the foundation, in case of an adverse decision, as before upon the merits, for an appeal in proper form to the Circuit Court.

APPEAL from the Circuit Court for the Northern District of Ohio; the case being thus:

By the Bankrupt Act it is thus in effect enacted:

"SECTION 1. That the several District Courts be . . . courts of bankruptcy, and shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. . . . And the jurisdiction shall extend to all cases and controversies arising between the bankrupt and any creditor who shall claim any debt or demand under the bankruptcy, to the collection of all the assets of the bankrupt; to the ascertainment and liquidation of the liens and other specific claims thereon; to the adjustment of the various priorities and conflicting interests of all parties; and to the marshalling and disposition of the different funds and assets, so as to secure the rights of all parties, and due distribution, &c.

"SECTION 2. That the several Circuit Courts . . . within and for the districts where the proceedings in bankruptcy shall be pending, shall have a *general superintendence and jurisdiction* of all cases and questions arising under this act; and *except where special provision is otherwise made*, may, upon *bill*, petition, or other proper process, of any party aggrieved, hear and determine the case [as] a court of equity.

"The powers and jurisdiction hereby granted may be exercised either by said court or by any justice thereof in term time or vacation.

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"Said Circuit Courts shall also have concurrent jurisdiction with the District Courts of the same district of all suits at law or in equity which may be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee touching any property or rights of property of said bankrupt, transferable to or vested in such assignee.

"SECTION 8. That appeals may be taken from the District to the Circuit Courts in all cases in equity, and writs of error may be allowed to said Circuit Courts from said District Courts in cases at law, &c., when the debt or damages claimed amount to more than $500; and any supposed creditor whose claim is wholly or in part rejected, or an assignee who is dissatisfied with the allowance of a claim, may appeal from the decision of the District Court to the Circuit Court; but no appeal shall be allowed unless it is claimed and notice given, &c., *within ten days* after the entry of the decree or decision appealed from. No appeal shall be allowed unless the appellant shall give bond in manner now required by law.

"SECTION 9. That in cases arising under this act no appeal or writ of error shall be allowed in any case from the Circuit Court to the Supreme Court of the United States, unless the matter in dispute in such case shall exceed $2000."

In this state of statutory law, one Vandeveer having been decreed a bankrupt, in the District Court for the Northern District of Ohio, a certain Stickney, his assignee, filed a petition against him, Huss, Wilt, Paine, Adams, and two others, to determine whether certain claims set up as liens upon the bankrupt's estate were liens.

The petition set forth the decree of bankruptcy against Vandeveer. It then alleged:

1st. That at the time thereof he owned a tract of land which he had bought from Mrs. Adams, and that she set up a vendor's lien upon it; which lien the assignee alleged had no existence.

2d. That another tract which he owned purported to be incumbered by a mortgage to Paine to secure a note of $4000, but that no debt was due to Paine, and that the mortgage had no legal validity as against him the assignee.

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Statement of the case.

3d. That he had given a note and mortgage to one Huss for $4000, which note and mortgage were never delivered to Huss, but were recorded by Vandeveer, at about the time of their execution, without the solicitation or knowledge of Huss, and that they were void.

4th. That the petitioner had been advised that one Wilt also claimed some kind of lien upon the said lands, but how or by means of what mortgage or otherwise the petitioner was not advised, but denied that any such lien or liens were so held or existed in favor of any person or persons whomsoever.

The petition prayed—

"That the parties above named, and each of them may be made parties defendant to this petition; that they and each of them be required to answer all and singular the charges and allegations aforesaid, and be also compelled to set forth and state in their respective answers hereto, each, the particulars and facts upon which any claim is made or based by such defendant or defendants; and that, on the final hearing hereof, all questions and rights of each and all the said parties may be ascertained and determined by this court, and that, by the order and judgment of this court, the petitioner be directed to sell the said lands and distribute the proceeds accordingly.

"And that the petitioner may have such other and further relief in the premises and may be further directed in his duties, as the nature of the case requires."

The petition did not pray for subpœna or other process.

Mr. and Mrs. Adams, as also Paine, waived it, however, and appeared. Wilt also appeared and answered.

Referring to the note and mortgage mentioned in the bill as given to Huss, and admitting their execution and record, Wilt alleged in his answer, that he, Wilt, afterwards became surety for Vandeveer, for $3260, and that in consideration of such suretyship, Vandeveer delivered the said note and mortgage to him, and that he had paid over $2000 on account of such suretyship.

The assignee replied, denying that Vandeveer delivered the mortgage to Huss, and that Wilt had become surety, and

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denying payment by him, and all debt to him by Vanderveer, &c.

Upon the hearing of these issues, the District Court held, that the mortgage never took effect, and decreed accordingly in favor of the assignee in bankruptcy.

Wilt thereupon filed his petition in the Circuit Court of the district for a review and revision of this decree, under the first clause of the above-quoted section of the Bankrupt law, which gives to the Circuit Court a general superintendence and jurisdiction of all cases arising under the act.* He set up the same case in the Circuit Court which he had made in the District Court, and prayed a reversal, &c.

Without answering this petition, the assignee filed a plea to the jurisdiction of the court.

Upon the petition and plea the cause was heard, the petition sustained, and relief decreed as prayed for; that is to say, the lien claimed by Wilt was decided to be a good one.

The assignee hereupon appealed to this court as if thereto authorized by the act of Congress, allowing appeals in cases of equity and maritime jurisdiction,† which act enacts that from "all *final* decrees rendered in any Circuit Court in any cases of equity or admiralty jurisdiction, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of $2000, shall be allowed to the Supreme Court of the United States, and that upon such appeal a transcript of the libel, bill, answer, *depositions, and all other proceedings, of what sort whatsoever*, shall be transmitted to the said court." The record in the case, as sent here, contained sufficient extracts from the record to understand the case, but did not comply literally with the act just quoted. This defect, however, was not alluded to at the bar.

Mr. A. G. Riddle, for the appellant:

1. The first and second sections of the Bankrupt Act seem to contemplate that as between the assignee, creditors, and others, questions may arise not falling strictly within

* See *supra*, pp. 151, 152.

† 2 Stat. at Large, 244.

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the scope of an action at law or a "case in equity." For such cases they provide for a summary proceeding on application to the District Court, and in this class of cases the aggrieved party may have the case reviewed in the Circuit Court, "upon bill, petition, or other proper process."

That the instances where this review may be had are limited to this class is apparent, for this action can alone be had in cases not otherwise specially provided for; and "all suits at law or in equity" are specially provided for by the third clause of section two.

Clearly, the subject-matter of the proceeding in this case was one of purely equitable jurisdiction. The case was a "case in equity" such as is contemplated in section eight. An *appeal* to the Circuit Court from the decree of the District Court lay under section eight. But the decree of the District Court remaining unappealed from is conclusive. The decree of the Circuit Court must be reversed for want of jurisdiction in it to review the case otherwise than on appeal. The decree of the District Court will then stand; with a right to take an appeal under the eighth section, if the time of appeal has not passed.

This question is within *Smith* v. *Mason*.*

Mr. G. E. Seney, contra:

The first question is as to the jurisdiction of the Circuit Court, but that is not, as the opposite counsel assume, the only question. There remains the question of the jurisdiction of this court to entertain the appeal, even if the Circuit Court had jurisdiction.

The argument made against the jurisdiction of the Circuit Court rests upon the assumption that this is a case in equity, and therefore that the proceeding is by bill in chancery.

But the proceeding was nothing more than an ancillary petition, in the ordinary form, for the purpose of obtaining an order for the sale of the bankrupt's estate. The adjustment of the liens is only *incidental* to the main object of the

* 14 Wallace, 419.

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petition, and preliminary to making the order of sale. The petition is like the petition of an administrator for an order to sell the decedent's lands for the payment of debts. Such a proceeding always involves the power to adjust and determine liens before ordering a sale. In the adjustment and determination of these liens, frequently important and difficult questions, involving legal and equitable principles, arise. Yet such a proceeding is not a case in equity.

The petitioner, the assignee in bankruptcy, as well as the District Court, treated the matter as a summary proceeding and not as a case in equity. No writ of subpœna was asked for, nor did one issue; nor was objection made by the court or the parties that the proceeding should be by bill in chancery, and not summarily upon petition.

The District Court has exclusive original jurisdiction of a proceeding asking for the sale of a bankrupt's estate, and the adjustment of the liens upon it, and no jurisdiction can be acquired by the Circuit Court on appeal.

The jurisdiction of the Circuit Court in this class of cases is conferred by that part of section two which gives to that court a general superintendence and jurisdiction of all cases and questions arising under the act, and authorizes it to hear and determine the case as a court of equity, upon the bill, petition, or other process of the party aggrieved.

This construction is held in *Morgan* v. *Thornhill*,* where the supervisory jurisdiction of the Circuit Court under section two extends to the decree of the District Court, adjudging the Bank of Louisiana a bankrupt, ordering a surrender of its property, and enjoining perpetually the State commissioners from the exercise of their functions under the laws of the State of Louisiana.

It is held again, in *Hall* v. *Allen*,† in a case of conflicting interests and disputed priorities between the individual and partnership creditors of a bankrupt.

It is held again, in *Mead* v. *Thompson*,‡ where this court decided that when a petition to the Circuit Court to re-ex-

* 11 Wallace, 65. † 12 Id. 458. ‡ 15 Id. 685.

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amine a decree of the District Court in bankruptcy prays the court to "*review*" and reverse that decree, and "to grant such further order and relief as may seem just," the jurisdiction invoked must be regarded as the supervisory jurisdiction which is allowed to Circuit Courts acting as courts of equity, by the second section of the Bankrupt Act.

It is held yet again, in *Marshall* v. *Knox*,* where it was decided that under section two of the Bankrupt Act the revisory jurisdiction of the Circuit Court extends to the orders of the District Court, made in proceedings commenced by the assignee of a bankrupt, to recover property from a sheriff, who held it under legal process.

The principle established by these adjudications gave to the Circuit Court, in the case at bar, jurisdiction under section two to review the order of the District Court, adjusting the liens upon and directing a sale of the bankrupt's estate.

The counsel on the other side suppose that the question of the jurisdiction of the Circuit Court in this case is within the rule of *Smith* v. *Mason*. In that case the question was whether an assignee in bankruptcy, who claimed a fund as the property of his bankrupt which was held and claimed *absolutely* by a third party, under a transfer made before the adjudication in bankruptcy, must proceed against such party summarily under section one of the Bankrupt Act, or by suit at law or in equity, under the third clause of section two.

The court held that inasmuch as the *absolute* title to the fund was the subject-matter of the controversy, the case was that of "an assignee in bankruptcy against a person who made an adverse claim to property transferable to or vested in the assignee," under the third clause of section two, of which the Circuit Court had concurrent jurisdiction with the District Court, and that the proceeding in such case must be as that clause expressly requires, a suit at law or in equity.

The case above mentioned, and others which may arise

* 16 Wallace, 552.

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under the third clause of section two, are to be distinguished from proceedings under the first section, which, like the one at bar, are within the exclusive original jurisdiction of the District Court, and which invoke only the powers of that court in ordering the sale of a bankrupt's land and in ascertaining and adjusting the conflicting claims of lienholders.

2. There remains now another question, and that is as to the jurisdiction of this court, assuming that the Circuit Court had a right to exercise supervisory jurisdiction.

We deny this jurisdiction and assert that the appeal should be dismissed.

It will be conceded as of course that if the Circuit Court had no jurisdiction no appeal lies from its judgment.

But even if the Circuit Court had jurisdiction, under the second section of the Bankrupt Act, then on the authority of the cases already cited,* no appeal lies to the Supreme Court.

Mr. Justice CLIFFORD, having stated the case, delivered the opinion of the court.

Two principal objections are taken to the proceedings, as tending to show that this court has no jurisdiction to hear and determine the case under the powers conferred by the Bankrupt Act:

1st. Because the original pleading in the District Court is a suit in equity, commenced under the third clause of the second section of the Bankrupt Act, which could only be removed into the Circuit Court by appeal, as provided in the eighth section of that act.

2d. Because an appeal will not lie from the Circuit Court to this court, from the decree of the Circuit Court rendered in a petition of review, filed under the supervisory jurisdiction conferred upon the Circuit Courts by the first clause of the second section of the said Bankrupt Act.

1. Concurrent jurisdiction with the Circuit Courts is con-

* Morgan v. Thornhill, 11 Wallace, 65; Hall v. Allen, 12 Id. 452; Mead v. Thompson, 15 Id. 551.

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ferred upon the District Courts of all suits at law or in equity, which may or shall be brought by the assignee in bankruptcy against any person claiming an adverse interest, or by such person against such assignee, touching any property or rights of property of such assignee, transferred to or vested in such assignee, by virtue of the fourteenth section of the act providing for such transfers.

Rights of property were claimed in these lands by the appellee, and the suit in this case was commenced in the District Court contesting that claim, which is plainly a subject-matter cognizable under that provision; nor is it any argument against that theory that the first pleading in the District Court is, in form, a petition, as suits at law and in equity, in many jurisdictions, are commenced in that form of pleading. Beyond all doubt the petition contains every requisite of a good bill in equity, whether the pleading is tested by the statement of the cause of action, or by the charging part of the bill, or by the prayer for relief, and if it be suggested that it contains no prayer for process, the answer to the objection is a plain one, to wit, that three of the parties respondent appeared and waived the issuing and service of process, and that the appellee voluntarily appeared and filed an answer.

Nor is it any valid objection to that view that the Circuit Court, under the supervisory clause of the second section, may, in certain cases, proceed by bill, petition, or other proper process, as the power conferred by that clause does not extend to any case or question "otherwise provided for," by any special provision, especially as it is clear that cases arising under the third clause of that section, where the debt or damages claimed amount to more than five hundred dollars, may be appealed from the District Court to the Circuit Court for the same district.*

Special provision, therefore, is made for the removal of such a case into the Circuit Court, and inasmuch as the case is made the subject of such special provision, it follows, be-

* 14 Stat. at Large, 520.

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yond peradventure, that it does not fall within the supervisory jurisdiction conferred upon the Circuit Courts by the said first clause of the second section.

2. Much discussion of the second question is unnecessary, as the justices of this court are unanimously of the opinion that the question is settled in the negative by the prior decisions of this court.*

Even a slight examination of that case will be sufficient to convince any inquirer that the question under consideration was directly presented for decision in that case, and it is equally certain, in the judgment of the court, that it was expressly decided without any qualification whatever. Attempts have since been made to induce the court to give its sanction to certain alleged exceptions to the rule, but the court has in every such case refused to countenance any such theory.†

Controversies, in order that they may be cognizable in the Circuit or District Court, under the third clause of the second section of that act, must have respect to some property or rights of property of the bankrupt transferable to, or vested in such assignee, and the suit, whether it be a suit at law or in equity, must be in the name of one of the two parties described in that clause and against the other, no matter whether they are citizens of the same State or not, as the jurisdiction is conferred by the Bankrupt Act and depends upon the conditions therein prescribed.

Final judgments and decrees in such cases rendered in the Circuit Court, if the matter in dispute exceeds the sum or value of two thousand dollars, may be removed into the Supreme Court for re-examination, as provided in the twenty-second section of the Judiciary Act.‡

Such judgments and decrees, however, in order that they may be re-examinable in this court, must be final judgments

* Morgan v. Thornhill, 11 Wallace, 72.

† Hall v. Allen, 12 Wallace, 452; Smith v. Mason, 14 Id. 419; Marshall v. Knox, 16 Id. 556; Knight v. Cheney, 5 National Bankrupt Register, 809; Insurance Co. v. Comstock, 16 Wallace, 258; Coit v. Robinson, 19 Id. 274.

‡ 1 Stat. at Large, 84.

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or decrees, rendered in term time, as contradistinguished from mere interlocutory judgments or decrees or orders which may be entered at chambers, or if entered in court are still subject to revision before the final disposition of the cause.

Prior to the passage of the Bankrupt Act the District Courts possessed no equity jurisdiction whatever, but it is undoubtedly true that those courts do now possess concurrent jurisdiction with the Circuit Courts in the cases specified in the third clause of the second section of that act, and that final decrees rendered by those courts in such cases, where the debt or damages claimed amount to more than five hundred dollars, may be removed by appeal into the Circuit Court for re-examination. Doubt upon that subject cannot be entertained, and it is equally certain that a final decree rendered in the Circuit Court in such a case, whether originally brought there, or removed there by appeal from the District Court, may be removed by appeal into this court for re-examination, provided the appeal is perfected as required in the acts of Congress allowing appeals in cases of equity and of admiralty and maritime jurisdiction.* Nothing of the kind was done in this case, as appears by the record.

Sufficient has already been remarked to show that the proceeding to revise the decree of the District Court was instituted and prosecuted throughout under the first clause of the second section of the Bankrupt Act, which confers upon the Circuit Courts merely a supervisory power over the proceedings of the District Courts in bankruptcy, and which the Circuit Courts may exercise in term time or vacation, and the provision is that the jurisdiction shall extend to questions, as well as cases, arising under the Bankrupt Act, except where provision is otherwise made. Special provision is otherwise made for appeals in cases like the one before the court, and it necessarily follows that the case is not one falling within the power conferred upon the Circuit Courts by the first clause of the second section of that act.

* 2 Stat. at Large, 244; 1 Id. 84.

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Where both the Circuit Court and this court are without jurisdiction it is in general irregular to make any order or decree in the case, except to dismiss the suit, but that rule does not apply to a case where the Circuit Court renders a judgment or decree in favor of the party instituting the suit, but in such a case the court here will reverse the judgment or decree in the court below, and remand the cause with directions to dismiss the suit.

Unless the practice were as explained great injustice would be done in all cases where the judgment or decree is in favor of the plaintiff or petitioner, as he would obtain the full benefit of a judgment or decree rendered in his favor by a court which had no jurisdiction to hear and determine the controversy.*

Want of jurisdiction to hear and determine the merits in such a case does not show that this court may not correct the erroneous judgment or decree of the Circuit Court, but if the Circuit Court is also without jurisdiction this court cannot direct a new trial or a new hearing, as it may do in a case where the want of jurisdiction in this court is occasioned by a mistrial in the court below, which has led to an erroneous removal of the cause from the Circuit Court into this court, as by appeal instead of a writ of error, or by a writ of error, when it should have been by appeal.†

Cases wrongly brought up, it may be admitted, should, as a general rule, be dismissed by the appellate tribunal, but a necessary exception exists to that rule where the consequence of a decree of dismissal will be to give full effect to an irregular and erroneous decree of the subordinate court in a case where the decree is entered without jurisdiction, and in violation of any legal or constitutional right. Rules of practice are established to promote the ends of justice, and where it appears that a given rule will have the opposite effect, appellate courts are inclined to regard the case as one of an exceptional character. Such courts, where there is no de-

* United States, Lyon et al. v. Huckabee, 16 Wallace, 485.

† Morris's Cotton, 8 Wallace, 512; Mail Company v. Flanders, 12 Id. 185.

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fect in bringing up a cause, usually affirm or reverse the judgment or decree of the subordinate court, but cases occasionally arise in which the proceedings in the lower court are so irregular that a mere affirmance or reversal upon the merits would work very great injustice, and in such cases it is competent for the appellate court to reverse the judgment or decree in question and to remand the cause with such directions, if it be practicable, as will do justice to both parties. Instances of the kind are numerous in the decisions of this court, nor is there much difficulty in accomplishing the end in view in a case where the subordinate court has jurisdiction of the subject-matter, and the right to a new appeal or writ of error is not barred by lapse of time.*

Difficulties of the kind frequently occur in cases of seizures, as the District Courts have often failed to distinguish between seizures on land and seizures on navigable waters, sometimes trying the latter as a common-law action, and sometimes trying the former as an instance cause. Mistakes of the kind have also been made in libels of information filed under the confiscation acts passed by Congress. Errors of the kind, when they have seasonably come to the knowledge of this court, have uniformly been corrected, as far as it is in the power of this court to afford a remedy. Serious embarrassment often arises in such cases where it appears that the subordinate court is also without jurisdiction, but that difficulty does not prevent this court from assuming jurisdiction, on appeal, for the purpose of reversing the judgment or decree rendered in such subordinate court, in order to vacate the same, when rendered or passed without authority of law.

Where the court below has no jurisdiction of the case in *any form* of proceeding, the regular course, if the judgment or decree is for the defendant or respondent, is to direct the

* Barnes v. Williams, 11 Wheaton, 415; Suydam v. Williamson, 20 Howard, 441; Carrington v. Pratt, 18 Id. 63; Prentice v. Zane, 8 Id. 484; Montgomery v. Anderson, 21 Id. 388; Mordecai v. Lindsay, 19 Id. 200.

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cause to be dismissed, but if the judgment or decree is for the plaintiff or petitioner, as in this case, the court here will reverse the judgment or decree and remand the cause with proper directions, which in the case supposed must be to dismiss the writ, libel, or petition, as the subordinate court cannot properly hear and determine the matter in controversy.*

Viewed in the light of these suggestions it is quite clear that the decree of the Circuit Court rendered under the petition of review, must be reversed, and inasmuch as the Circuit Court has no jurisdiction of the subject-matter in that form of proceeding, and that it is now too late to take an appeal from the District Court to the Circuit Court, the cause must be remanded with directions to dismiss the petition.

Unable to refer the appellee to any legal remedy as matter of right, under the present pleadings, it seems to be proper, in the judgment of the whole court, to suggest that it may be that the District Court will grant a review of the decree rendered in that court, if a proper application is presented for that purpose, which would lay the foundation, if it be granted, in case of an adverse decision upon the merits of the case, for a regular appeal to the Circuit Court.

DECREE REVERSED without costs, and the cause REMANDED with directions to dismiss the petition

FOR WANT OF JURISDICTION.

* Insurance Company v. United States, 6 Wallace, 760; Armstrong's Foundry, 6 Id. 769; United States v. Hart, 6 Id. 772; The Caroline, 7 Cranch, 500; The Sarah, 8 Wheaton, 394.

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THE SEA GULL.

A steamer held to be exclusively responsible for a collision with a sailing-vessel; the collision having occurred on a night when the stars were plainly visible, and when, though a little haze was on the water, the night was to be called clear; there having apparently been some want of vigilance in the lookout of the steamer, who did not discern the sailing-vessel until the steamer was close upon her, at which time orders, which, as the result proved, tended to bring on a collision, were given on board the steamer.

CROSS-APPEAL from the decree of the Circuit Court for the District of Maryland, dividing equally the damages arising from a collision at sea, between the schooner Sarah and the steamer Sea Gull, on the theory that each was equally in fault.

The case was thus:

A statute of the United States—the act of 29th April, 1864—thus enacts:

"ARTICLE 16. Every steamship, in approaching another ship, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse.*

"ARTICLE 15. If two ships, one of which is a sailing-ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing-ship."

These provisions did but embody in a statutory form, what was previously the well-settled law of the sea.†

On the evening of January 21st, 1871, the steamer Sea Gull was sailing in the open sea from the north, between Baltimore and Charleston, for the south, in a course south by west half-west, and the schooner Sarah between the same

* 13 Stat. at Large, 61.

† St. John v. Paine, 10 Howard, 558; The Genesee Chief, 12 Id. 460, cases decided by the Supreme Court in 1850 and 1852; New York and Virginia Steamship Co. v. Calderwood, 19 Id. 245, decided in 1856; The Steamer Oregon et al. v. Rocca, 18 Id. 570; and Haney v. Baltimore Steam Packet Co., 23 Id. 291, decided in 1859; The Carroll, 8 Wallace, 302.

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ports, from the south for the north in a course northeast by east. The vessels were thus approaching on converging lines. The steamer's speed was about eight miles an hour, the schooner's seven, and the nearest land was thirty miles distant. There was a fresh breeze, west-southwest. Stars were visible overhead, and though it was somewhat hazy on the water the night was fairly to be called a clear one.

Both vessels had proper lights brightly burning in their proper places. The schooner had one lookout properly placed, and the steamer had one lookout also; the steamer's lookout being on the forecastle, and, as was testified, within a few feet of the stem. At about nine o'clock in the evening the lookout on the schooner descried and reported a light ahead. The light proved to be the foremast-headlight of a steamer, about four miles distant, and one point on the port bow of the schooner. The red or portlight of the steamer, which was still on the schooner's port bow, soon now became visible. The schooner, according to the positive testimony of three witnesses on her, including the pilot and the captain, who was at his side giving orders—the captain giving repeated orders to this effect, and calling the helmsman's attention to a star by which he could steer if he could not by the compass—*continued her course*, when, according to the testimony of these same witnesses, the steamer not having previously changed her course at all, and the vessels being close by one another, the green or starboard light of the steamer came suddenly into view; showing, of course, that the helm of the steamer had been starboarded. The captain and master testified that not knowing on which side of her the steamer would attempt to pass, and deeming it prudent and their duty under the circumstances still to keep their course, so as not to baffle those in charge of the steamer in any effort which they might make, even at the last moment, to pass on either side, still kept the schooner steadily on her course, but that the steamer continued, with undiminished speed, to approach. The result was a collision in which the steamer ran so violently into the schooner as

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to cut three or four feet into her, and sink her almost immediately; those on board barely escaping with their lives.

The only oral or written evidence from witnesses on the schooner tending to show any other proceedings than these, was that of the captain himself, who testified that when the steamer was about to strike the schooner, and only forty or fifty yards off, he shouted out, "Let go her gaff-topsail, and lower her peak;" but that the order was not executed, the collision having occurred immediately after it was given, and before time had elapsed to execute it.

However, three witnesses from the steamer—the captain, the second mate, and the helmsman—all swore that when the collision took place, the course of the schooner was southeast; a course which would have been produced by the execution of the captain's order to change the schooner's sails, and that as they saw her sails after the schooner was struck her sails were on the port side.

As respected what was done on board the steamer, it seemed from the testimony of witnesses from her that the schooner was not seen until about a quarter of an hour after the schooner had seen the steamer; that her sails were then seen by the lookout, though they could not be well distinguished from each other; that the captain, whose watch it was, was in his room, asleep; that the second mate belonged to the captain's watch, and was accustomed to be on deck only during the captain's command, when his own position was subordinate; and that on this occasion he had taken charge of the captain's watch; that the second mate saw the vessel on the starboard bow, about the same time the lookout did, and *at once* gave the order "hard a starboard," to the man at the wheel, helping him to heave it hard a starboard himself; that when the order to heave hard a starboard was given, no lights, either red or green, were seen, and that the schooner was then supposed to be half a mile off, if not more; that the steamer answering the wheel, her head fell off to port, three or four points, and the second mate then saw the schooner's red light plainly, and saw that she had ported her helm and changed her course, about half a

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point to the east, which brought her across the steamer's bow; that the moment this was seen, the wheel was put hard a port; that on the same moment the bell was rung, the engine was stopped, and the captain was in the act of ringing the bell to back the ship when the collision took place; a collision so seriously injuring the steamer that water came into her by the barrelful, and that it was only by incessant working of the steam pumps that the vessel was able to make port (which she sought at once to do), at all. How exactly the schooner was struck, and where, was a matter about which the testimony was not harmonious.

One witness (the second mate of the steamer) testified that the steamer struck the schooner on her port side, just forward of the main-chain, nearly at right angles, with a slight slant towards the bow of the schooner.

Other witnesses testified that the steamer struck with a slight slant towards the stern of the schooner.

It was more plainly proved that the steamer received her injury on the port side of her stem.

The District Court held both vessels liable.

In regard to the steamer, the court said that before the officer in command changed its course, he should have waited to see the lights of the schooner, and as the vessels were approaching at the rate of fifteen miles an hour, have stopped the steamer's engine; that starboarding was a false movement; one not corrected but made worse by the subsequent porting.

In regard to the schooner, while the court confessed to a good deal of difficulty, in view of the conflict of evidence, and in a certain want of particularity in it, as to exact times when things were stated to have been seen, in saying that the schooner too was to blame, yet relying upon the evidence of the three persons on the steamer, that when the collision took place the course of the schooner was southeast and her sails on the port side, and on the further testimony of the second mate of the steamer, that she struck the schooner on her port side just forward of the main chain nearly at right angles, with a slight slant towards the bow

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of the vessel, the court thought that the course of the schooner must have been changed before the collision. The court, therefore, held both vessels equally in fault, and made each equally responsible for the damages; expressing a hope, however, that the case might be reviewed by another tribunal.

The Circuit Court, on appeal, affirmed the decree of the District Court, and from the decree of affirmance the case was now here on appeals by both vessels.

Messrs. S. T. Wallis and J. H. Thomas, for the owners of the schooner:

1. The steamer was exclusively in fault. She had but one lookout. She was an ocean steamer and, as such, should have had two; and they ought to have been on the very bow of the boat, on the lower deck, looking ahead.*

It was the captain's watch. He should have been on deck.† He was asleep in his cabin. The second mate was on his watch, and took charge of it. The result shows that the mate was incompetent for the duty which, owing to the captain's neglect, was put upon him.

With inattentive and incompetent officers thus proved to have been in charge of the steamer, every presumption, in matters where the testimony conflicts or is obscure, is against her; and with this as a thing not to be denied the whole case is to be considered.

The steamer took no measures to discover the course of the schooner when she was seen, but *immediately* starboarded and a moment after ported her wheel. She did not stop her engines till the moment of collision.

2. The schooner was not in fault. Both of her lights were burning brightly. She saw the steamer's headlight five miles off. Gave immediate orders to the helmsman, and several times repeated them, to keep her steadily on her course. She did not change her course from the mo-

* Chamberlain v. Ward, 21 Howard, 571.

† Haney v. Baltimore Steam Packet Co., 23 Id. 292.

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ment she saw the steamer up to the moment of collision. If the testimony leaves any room for doubt on this point, it shows, at all events, that she did not change until they were within thirty or forty feet of each other. A change at such a moment could not have contributed to the collision. If it did, she will not be held responsible for a mistake in a moment of well-founded alarm and danger, needlessly produced by the previous fault of the steamer.

The steamer alleges that the schooner changed her course. This court has heretofore said:

"This is the stereotyped excuse usually resorted to for the purpose of justifying a careless collision. It is always improbable, and generally false."*

An attempt was made to create the impression that some of the witnesses for the steamer saw the sails of the schooner on her port side before the collision. But in the face of the evidence, that the schooner was kept on her course, the strong probability is that none of them saw the *direction* of her sails until *after* the collision.

Even if her foresail, the one nearest the steamer and that most likely to be seen by her, was momentarily on the port side, it might be true consistently with the theory and testimony of the schooner. Going as they were, before the wind, the foresail would be occasionally becalmed by the mainsail. It was then liable to flap over to the port side.

The witnesses on the schooner swear positively that her course was not changed. They speak from knowledge. Any counter evidence from persons on the steamer is from inference only.†

The District Court would have adopted this reasoning, and have concluded that the schooner did *not* change her course, but for what it considered a controlling fact leading to a contrary conclusion. He considered, of course, that if the schooner had *not* changed her course she would have

* Haney v. Baltimore Steam Packet Co., 23 Howard, 291.

† The Fannie, 11 Wallace, 240; New York and Liverpool Steamship Co v. Cumball, 21 Howard, 382; The Genesee Chief, 12 Id. 461.

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Argument for the steamer.

been struck a slanting blow on the port side, with a slight slant towards the stern. There are witnesses who prove that such was the exact blow given, and confessedly the steamer's bow was injured on its port side, not on its starboard; a fact which tends to show that the sort of blow which the District Court supposes was *not* given, was the very one that was.

The vast advantages which vessels navigated by steam have over sailing-vessels, is their capacity to turn suddenly, and most of all to stop at once; and this, with all their tremendous power, and the effect of a collision with them, has led courts to hold, almost as an irrebuttable presumption, that when, *on a clear night, in open sea*, a collision takes place between a steamer and a sailing-vessel the fault *must* be with the steamer; or at least to require very plain proof that it was not.

The courts do but give effect to that provision, alike of a positive statute and of the common law of the sea, that "if two ships, one of which is a sailing-ship, are proceeding in such directions as to involve risk of collision, the steamship *shall keep out of the way* of the sailing-ship."

In two cases where the sailing-vessels were held in any part responsible, the night was not clear and the schooners either had no light or insufficient ones.*

Messrs. J. H. B. Latrobe and I. N. Steele, contra, for the steamer:

That the steamer changed its course after sighting the schooner is admitted. The steamer's course down the coast having been southwest-half-west, adding three and a half points to port, and then deducting half a point to starboard, her course at the time of the collision would be south and by west half west.

And this we assume as the fact.

But did not the schooner change her course also? And here the usual contradictory testimony begins.

* The Potomac, 8 Wallace, 592; The Ariadne, 18 Id. 475, 476.

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The schooner's witnesses, one and all, swear that up to the moment of collision the schooner's course was not changed; and, if they are to be believed, the schooner's course at the moment of collision was northeast by east.

The same witnesses swear, however, that the steamer struck the schooner at right angles and penetrated some three or four feet.

Now, they cannot be right on both points. Had the schooner held her course, northeast by east, that of the steamer being southwest by west-half-west, the steamer would have struck her at an angle of thirty-nine degrees, about; when a penetration of the schooner, such as all the witnesses on both sides agree took place, was physically impossible.

It follows as a matter of course then, as decided by the District and Circuit Courts, that the schooner changed its course.

This puts the case on two indisputable facts; first, the position of the steamer at the time of the collision; and second, the square blow received by the schooner.

Nor is this all. That the captain of the schooner intended to change his course is proved by the command he gave to lessen his aftersail preparatory to jibing, "Let go the gaff-topsail-sheet; slack the peak down."

Now, as these orders would not have been given had it not been intended to go to the eastward, and as the course of the vessel was to the southeast when struck, the inference is strong that the order must have been given in time for the change in position testified to by witnesses on the steamer.

It was partially on reasoning like the foregoing that the courts below came to the conclusion that the schooner changed her course. And inasmuch as this change of course seems to have proceeded from no apprehension on the part of the captain of the schooner—for he speaks of none—there was nothing to justify it. Had he kept his course there would have been no collision; or, at most, the comparatively harmless one attending a glancing blow at an angle of half a point.

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Had there been no other testimony in the case but that which is here referred to, the decree would have been for the owners of the steamer.

There was other testimony, however; and this, in the court's opinion, involving the steamer, the loss was divided.

We contend, however, that the steamer was altogether blameless in the premises.

The gravamen of the charge against her is that the helm was put to starboard, and not to port, as it is contended it should have been when the schooner was seen approaching, and that subsequently it was ported.

But starboarding the helm when the schooner was seen over the steamer's starboard bow, was running away from the approaching vessel and consequently proper. To port the helm subsequently was equally proper, when it became apparent from seeing the red light that the approaching vessel had changed her course.

Much reliance is had by the other side on the fact that the captain was in the cabin when the collision became inevitable. If by any possibility the accident could have been attributable to his absence, no doubt the consequences should be visited upon the steamer. But if we show, as we do, that everything was done that was proper to be done in the case, irrespective of the captain, his absence becomes a matter of indifference.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Until within a recent period the sailing regulations founded in ancient usage, sometimes called sea laws, sanctioned by the decisions of the admiralty courts, furnished the principal rules of navigation in such emergencies, aided by the adjudications of the prize courts, whose practice conforms in some respects to the law of nations. Recently Congress has enacted regulations upon the subject, and those regulations are obligatory upon our commercial marine in all cases where they apply, but inasmuch as the act of

* The Fannie, 11 Wallace, 243.

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Congress does not profess to regulate the whole subject of sailing-rules it cannot be understood as superseding the prior established usages of navigation which are not embraced in the sailing-rules contained in the Congressional enactment.

Signal lights of a prescribed character are required to be carried by steam-vessels when under way, and sailing-ships under way are required to carry similar lights, with the exception of the white masthead lights, which they shall never carry. Such a requirement, however, is of very little or no value unless the lights are properly displayed and kept burning brightly, nor is it then of any value as a precaution unless those in charge of the other vessel use the means to see the approaching lights before it is too late to adopt the proper measures to prevent a collision.

Lookouts are also required by the usages of navigation, but the object of the requirement will never be accomplished in case the lookout fails to perform the duty which the requirement contemplates. Nautical lookouts must be properly stationed, and should be vigilant in the performance of their duty, and if they are incompetent or inattentive, and the collision occurs in consequence of their neglect, the vessel to which the lookout is attached must be held responsible for the injury resulting to the other vessel.

Steamers approaching a sail-ship in such a direction as to involve risk of collision are required to keep out of the way of the sail-ship, but the sail-ship is required to keep her course unless the circumstances are such as to render a departure from the rule necessary in order to avoid immediate danger.

Vessels with sails being required to keep their course the duty of adopting the necessary measures of precaution to keep out of the way is devolved upon the steamer, subject only to the condition that the sail-ship shall keep her course and do no act to embarrass the steamer in her efforts to perform her duty. Doubtless the steamer may go to the right or left if she can keep out of the way, but if not, and the approach is such as to involve risk of collision, she is re-

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quired to slacken her speed, or if necessary stop and reverse, and if she fails to perform her duty as required by the rules of navigation she is responsible for the consequences if the sail-ship is without fault, unless the steamer can show that the collision was the result of causes which could not be foreseen or prevented, or of inevitable accident.

In the case before us both vessels had proper signal lights and both had lookouts, but the better opinion is that the lookout of the steamer was not as vigilant as he should have been in the performance of his duty. Strong support to that view is derived from the fact that the lights of the steamer were seen by the lookout of the schooner when the vessels were three or four miles apart, but those in charge of the steamer saw nothing of the schooner until the two vessels were within a half-mile of each other, and then saw at first only the sails of the schooner and those indistinctly.

Where the emergency is great the order to the helmsman should undoubtedly be prompt, but under the circumstances of this case it was a rash act of the second mate to direct the man at the wheel to starboard the helm, as he did, before he had employed any available means to ascertain the course of the schooner. He admits that he had not seen the lights of the approaching vessel and the lookout admits the same thing. They both say that they saw the sails, but they admit that they could not distinguish one sail from another, and it may be that it was the shadow of the sails and not the sails themselves which was present to their sight at that moment.

Evidently the order was an injudicious one, which is sufficiently shown by the testimony of the officer who gave it, as he admits that in a short time he found it to be advisable to countermand the order and to direct the wheelsman to put the helm hard to port. Well-founded doubt cannot be entertained that if that order had been given in the first place the collision would never have taken place. Probably it was too late then, as the steamer had fallen off three or four points before the second order could be fully executed,

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and it appears that the collision occurred before the steame could be brought back under the second order to the course she was pursuing antecedent to the first change made in her course.

These repugnant orders manifestly put the steamer upon a zigzag course, that is, first to the left and then to the right, and afford plenary proof that the officer in charge of the deck was in great doubt what to do, in which event it was his plain duty to slacken his speed, or, if necessary, as it plainly was, to stop and reverse, but he did nothing of the kind in season to render any such precaution effectual.

Undoubtedly it was the privilege of the steamer to go to the right or left if in so doing she could, with reasonable certainty, keep out of the way; but if not, it became her imperative duty to slacken her speed and, if necessary, to stop and reverse.

Corresponding conclusions were reached by the district judge, except that he did not find that the lookout of the steamer failed to see the lights of the approaching schooner as soon as he might have done if he had performed his duty. Much reason exists to conclude that the first error of the officer in charge of the deck was occasioned by that omission of the lookout, and that the excitement induced when he discovered that his first order was an improper one had more or less influence in promoting the subsequent errors. Subject to that qualification the views expressed by the district judge in respect to the conduct of the officer in charge of the deck of the steamer appear to be correct.

Cases arise unquestionably in which the want of a lookout, or his failure to perform his duty, will not be imputed to a vessel as a culpable fault, as where it appears that the other vessel was seen by the officer in charge of the deck in season to adopt every needful precaution, and that the want of a lookout or his failure to perform his duty as such did not and could not have contributed to the disaster, but it is very doubtful, in view of the circumstances, whether the case before the court falls within the first condition, and it is quite clear that the evidence will not support the conclusion that

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the negligence of the lookout did not materially contribute to the subsequent mistakes and vacillating conduct of the officer in charge of the deck of the steamer.*

Approaching, as the two vessels were, on converging lines, it would clearly seem that the lookout of the steamer ought to have seen the schooner much earlier, as the evidence is full to the point that her signal lights were burning brightly, and if he had, it is not doubted that the collision would have been avoided, as the officer in charge of the deck of the steamer would, in all probability, have acted with more deliberation, in which event it may well be supposed he would not have given the direction that the course of the steamer should be changed before he had ascertained the course of the approaching vessel.

Considering the proximity of the vessels it may be admitted that prompt action was required, but it is plain that it was bad seamanship to change the course of the steamer before it had been ascertained whether the effect of the change directed would be to diminish or increase the danger to be apprehended from the impending peril. They, the two vessels, were still a half a mile apart, and time enough remained to adopt the proper precautions to prevent a collision, nor is it any valid excuse for the error committed to say that the officer in command of the deck was ignorant of the course of the schooner when he gave the order to starboard the helm, as in that event he should have waited a moment for that information, or, if the peril was impending and the danger too immediate to justify any delay on the occasion, then he should have slackened his speed, or, if necessary, stopped and reversed, as required by the sixteenth sailing-rule.

Beyond all doubt the order to starboard, under the circumstances, was an error, and the evidence warrants the inference that the officer who gave it came to the same conclusion as soon as he saw the red light of the schooner, which he admits he did see in a very short time after he gave the

* The Farragut, 10 Wallace, 337; The Dexter, *supra*, 69.

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erroneous order. Sufficient appears to satisfy the court that the order to starboard was given without due reflection, and that the attempt to correct the error by directing the wheelsman to port the helm was not given in season to prevent the disaster, as the steamer in the meantime had fallen off more than three points.

By the sailing-rules the steamer was bound to keep out of the way, and the whole evidence shows that she did not comply with that requirement, and the rule of decision in such case is that, *primâ facie*, the steamer is in fault; nor does the case rest merely upon that presumption, for several reasons: (1.) Because the evidence shows affirmatively that the order to starboard given by the officer in charge of the deck was an improper order. (2.) Because the lookout of the steamer was negligent in the performance of his duty. (3.) Because the steamer did not slacken her speed nor stop and reverse in season to accomplish the object contemplated by the enactment containing that requirement.

II. Attempt is made in argument to show that the schooner also was in fault, and that the case falls within the rule which requires that the damages shall be divided.

Support to that charge is attempted to be drawn from the assumed fact that the schooner changed her course in violation of the rule of navigation which requires the sail-ship to keep her course, as a correlative duty to that of the steamer whenever the latter is required to keep out of the way. Such undoubtedly is the general rule of navigation, but it is subject to the qualification that it does not apply in such a case when a departure from it is necessary to avoid immediate danger.*

Two answers are made by the libellants to that defence, either of which if found to be true is sufficient to exonerate the schooner from the consequences of the accusation, if proved to be well founded: (1.) That the evidence invoked for the purpose does not establish the charge. (2.) That the schooner made no change in her course until the collision

* 18 Stat. at Large, 61.

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was inevitable, nor until it became indispensably necessary in order to avoid immediate danger caused by the fault of the steamer.

1. All must admit that the burden to establish the charge is upon the claimants. They examined witnesses belonging to the steamer to support the theory of the defence, but the remark is applicable to them all that their cross-examination showed that they had no actual knowledge upon the subject, that they inferred that the charge was true from the fact that the two vessels collided, and from the manner in which they came together.

On the other hand all the persons on the deck of the schooner were examined by the libellants, and they testify, with one accord, that the schooner did not change her course as alleged by the claimants. Two of those, to wit, the wheelsman and the master who stood by his side, must know what did take place in that regard, and unless they have wilfully stated what they know to be false their statements must be correct; nor can it be denied that they state in the most positive terms that the charge is untrue. They were on the deck of the schooner and had the opportunity to know everything which occurred around them, nor can they well be mistaken in respect to the matter in question, but the witnesses on the steamer only infer what transpired on the deck of the schooner, and of course their statements are in the nature of opinions, and are certainly entitled to much less credit than such as are founded in actual knowledge of what did take place.

Mere inference from the circumstances of the collision is not reliable, since it is fully proved that the steamer attempted in the first place to go to the left and then ported her helm and attempted to go to the right; nor is it correct to suppose that the angle of the steamer when she struck the port side of the schooner was towards the stem of the schooner, as the proof is quite satisfactory that it was towards the stern.

Some of the witnesses state that the steamer struck the schooner at right angles, but the better opinion is that it was

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with a slight angle in the opposite direction from that found by the district judge, if his opinion is correctly exhibited in the record. Strong confirmation of that view is derived from the conceded fact that it was the port side of the stem of the steamer that was injured by the concussion. She cut three or four feet into the schooner just forward of her main rigging, and being herself injured on the port side of her stem the inference is a reasonable one that she was heading somewhat towards the stern of the schooner.

2. Be that as it may, it still is insisted by the claimants that the schooner changed her course and violated the sailing-rule which forbids it, but the evidence is not sufficient to establish the charge nor to render it probable that anything of the kind occurred, unless perhaps at the moment before the collision, when the master, seeing that the peril was impending, took the wheel from the helmsman and gave the order "let go her gaff-topsail sheet and lower the peak," but the order was not obeyed, as there was no time to execute it before the steamer struck the schooner.

Rules of navigation continue to be applicable as long as the means and opportunity remain to avoid the danger, but they do not apply to a vessel required to keep her course after the wrongful approach of the opposite vessel is so near that the collision is inevitable. Steamers under the rule that they shall keep out of the way must of necessity determine for themselves and upon their own responsibility, independent of the sailing-vessel, whether it is safer to go to the right or left or to slacken their speed or stop and reverse, and in order that the steamer may not be deprived of the means of determining the matter wisely, and that she may not be defeated or baffled in the attempt to perform her duty in the emergency, it is required that the sailing-vessel shall keep her course and allow the steamer to pass either on the right or left, or to adopt such other measures of precaution as she may deem best suited to enable her to perform her duty and fulfil the requirement to keep out of the way.

These rules of navigation are of great importance, but

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they do not apply to the vessel required to keep her course after the wrongful approach of the steamer is so near that the collision is inevitable, nor will an error committed by the sail-vessel under such circumstances of peril, if she is otherwise without fault, impair the right of the sail-vessel to recover for the injuries occasioned by the collision, for the plain reason that those who produced the peril and put the sail-vessel in that situation are chargeable with the error and must answer for the consequences.*

Subject to that exception the sail-vessel must keep her course, but the case before the court, if any change was made in the course of the schooner, falls within the exception, and it follows that the decree of the Circuit Court must be reversed, with costs, and the cause remanded with directions to enter a decree in favor of the libellants for the whole value of the schooner, her freight, and cargo.

DECREE REVERSED.

THE CORN-PLANTER PATENT.

[BROWN v. GUILD. SAME v. SELBY.]

1. Five reissues were granted on a surrendered patent, granted originally in 1858 to G. W. Brown, for improvements in corn-planting machines. On two bills, one against Bergen & Sisson and the other against Selby et al. for infringement, four of these reissues were sustained and one declared void for want of novelty.
2. Out of five reissues granted on a surrender of a patent granted in 1855, four were declared invalid for want of patentable novelty, and one reissue, No. 1095, was declared valid.
3. An invention described in an application for a patent filed in the Patent Office is not of itself a bar to a subsequent patent therefor to another. Such an application may have a bearing on the question of the defence of prior invention or discovery, but will not of *itself* take such prior invention or discovery out of the category of unsuccessful experiments.
4. The several reissues, Nos. 1086, 1088, and 1089, held to be good, as being for things contained within the machines and apparatus described in

* Steamship Co. v. Rumball, 21 Howard, 383.

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the original patents, although not claimed therein. Any question of fraud in obtaining these reissues is to be regarded as settled by the act of the Commissioner of Patents in granting them.

5. Reissues Nos. 1036, 1038, and 1039 are not obnoxious to the objection that they are for substantially the same combination, and therefore not for distinct parts of the original machine.
6. The use of the words "substantially as and for the purposes set forth," in a claim, throws it back to the specification, for qualification of words otherwise general.
7. The claim of Reissue No. 1036 thus construed, held to be valid and to be for two separate frames—one having two wheels, and the other two runners.
8. The defendants held to have infringed it.
9. Reissue No. 1037 declared void for want of novelty.
10. Reissue No. 1038 held to cover the combination of two separate frames, one having two wheels and the other two runners, *when they are combined together by a hinged joint.*
11. The defendants held to have infringed this claim, although in one, Selby's machine, the hinge is located at a different part of the machine; *the office, purpose, operation, and effect being the same.* A change a little more or less backward or forward held not to change the substantial identity.
12. A patentee by his claim as to what he regards as new, by necessary implication disclaims the rest as old, and such remaining parts are to be regarded as old or common and public.
13. Claim 1 of Reissue 1039, if construed simply as claiming the placing of the dropman on the machine, would probably be held void as claiming a mere result irrespective of the means by which it is accomplished; but if construed as claiming the accomplishment of the result by substantially *the means described* in the specification it is free from that objection. Such claim should be construed in this limited manner if possible in order to save the patent.
14. Claim 2 of Reissue No. 1039 embraces the combination consisting of one frame, the runner-frame having the seat for the dropman, and another frame, the wheel-frame, having a lifting lever fulcrumed to it. The defendants *held* to have infringed this claim, although the levers used, in themselves, were different in form and point of attachment from the appellant's lever.
15. Reissues Nos. 1091, 1092, 1093, and 1094 declared void for want of sufficient invention to constitute patentable novelty.
16. The combination (in 1091) of a seat for a driver, on a machine which had a dropman's seat on it when a driver's seat had been used on a similar machine before, but without a dropman's seat thereon, does not constitute a patentable invention.
17. The Reissue 1095 explained, and the novelty of the combination for effecting double dropping pointed out. Both the defendants held to have infringed the claim of this reissue.

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Statement of the case.

APPEALS from the Circuit Court for the Northern District of Illinois.

G. W. Brown filed two separate bills in equity in the court below, against Bergen and Sisson, in the one case, and against Selby and others in the other case, charging them respectively with infringement of certain letters-patent granted to him, Brown, for improvements in corn-planting machines, being reissues of previous patents, and praying for an account of profits, for injunctions, and for general relief. The defendant in the first case filed an answer, and two amended answers, setting up, in general, that the complainant was not the original and first inventor of the improvements patented to him, but that the same were previously known and used by various other persons named in the answers, and that the reissued patents of the complainant were fraudulently obtained; and they denied that they infringed the complainant's patents. The pleadings in the other case were substantially the same. Much testimony having been taken, the causes were heard together before the Circuit Court, and the complainant's bills were severally dismissed. The appeals were from the decrees dismissing them. Bergen, one of the original defendants in the first case, having died, the cause was revived in the name of his executor, one Guild, who, with the other defendant, Sisson, were the now appellees in that case.

The invention, as to which the controversy in the cases arose, is one which is called "a check-row corn-planter;" an invention intended to facilitate the planting of Indian corn (maize) in the best way.

This sort of corn, as most persons have observed, is usually planted in rows; rows from three feet ten inches to four feet apart. It requires to be so planted in order that the spaces between and all around the hillocks in which it is planted may be ploughed, after the corn begins to grow; or (to use the technical term) that the corn may be "cultivated." For if weeds are allowed to grow about the corn they impair its strength and diminish its productiveness.

Prior to the time when "the check-row corn-planter" was

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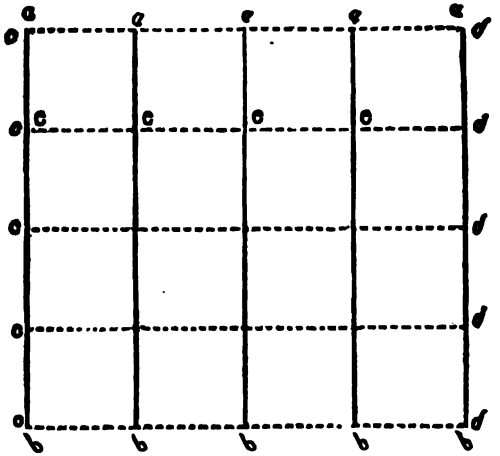
devised, and while, of course, all planting was done by hand, farmers used to secure the planting, properly, in rows, with the grain at right distances from each other, in this way. They made a series of transverse scratches or marks across the field, as shown by the black lines *a b* in the design below.

FIG. 1.



Then, when they came to plant, they ploughed transversely, as shown by the dotted lines *c d*, and at the intersections *e e* of the furrow *c d*, with the scratched line *a b*, they dropped the corn. The corn therefore grew in regular rows, and could be "cultivated" by means of a plough drawn by a horse who went between the rows in both directions.

But this operation of drawing great numbers of lines and ploughing in two directions across large fields, and of dropping the corn by hand at the intersections, was a slow and laborious one, and one requiring great care in order to be accurately done.

The object of the improvement under consideration in these cases was to do this work—that is to say, to plant the corn in the best way in hills at exact and proper distances apart—dispensing with much of the former labor.

The first and principal question in the causes was, whether the complainant, Brown, was the original and first inventor

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of the improvements claimed by and patented to him, or whether he was anticipated therein by other persons named in the answers of the defendants.

As set forth in the bill, the first patent obtained by the complainant for one portion of his alleged invention and improvement, was granted to him on the 2d day of August, but antedated the 2d day of February, 1853. This patent was surrendered on the 16th day of February, 1858, and a new patent was issued in lieu thereof, upon a corrected specification. This reissued patent was also surrendered on the 11th day of September, 1860, and in lieu thereof five new patents were issued upon five several corrected specifications, which new patents were numbered respectively reissues 1036, 1037, 1038, 1039, 1040, each one being for a distinct and separate part of the original invention, alleged to have been made by the complainant.

On the 8th of May, 1855, a patent was granted to the complainant for certain improvements on his corn-planter, which patent was, on the 10th day of November, 1857, surrendered, and a new patent was issued in lieu thereof on a corrected specification. This last patent was also surrendered on the 11th day of December, 1860, and five new patents were issued in lieu thereof on five amended specifications, each being for a distinct and separate part of the improvements intended to be secured by the patent of 1855. The last-mentioned patents were respectively numbered reissues 1091, 1092, 1093, 1094, and 1095. Copies of all the reissued patents of both series were annexed to the bill. Upon the taking of proofs in the cause, copies of the two original patents, and of the first reissues thereof, as well as the reissued patents on which the bill was founded, were put in evidence, together with full and detailed drawings and models of the complainant's original and improved machines.

The defendants, in their answer and the several amendments thereof, referred to many machines, patents, and applications for patents which, as they alleged, embodied all the improvements of the complainant's machine, and ante-

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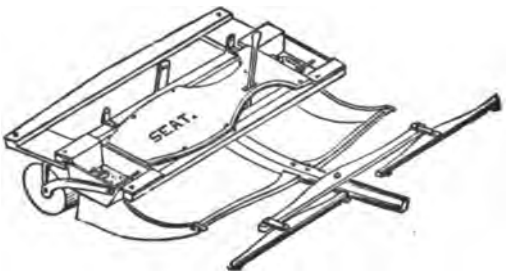
dated the same. These will be more particularly referred to after the features of the complainant's machine have been described.

The original machine, the patent for which was granted to the complainant on the 2d day of August, 1853, and the application for which patent was dated the 27th of September, 1852, is shown in perspective in Figure 2, and consisted of the following parts:

FIG. 2.

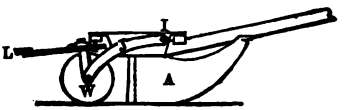


1. A framework supported on two runners—the latter being used for cutting a gash or furrow in the earth to receive the seed; each runner having a cleft at the rear end for allowing the seed to drop to the ground, and furnished with a hopper above, containing oscillating horizontal valves for dropping the seed at proper intervals into the gash or furrow through a tube in the heel of the runner.

2. Another framework, following the first, and supported on two wheels, or rollers, to follow the runners and press the earth down upon the seed in the gash or furrow.

The relation of the runners A to the covering-wheel W is shown at Figure 3, which is a side view of Brown's machine.

FIG. 3.



3. A free or jointed connection between the two frames, allowing them to rise and fall independently of each other

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in going over inequalities of surface. This jointed connection was formed by a bolt passing through the arm J, Figure 3, at the point I.

4. A system of levers resting on the axle of the wheels under the rear frame, shown at L, Figure 3, and so applied to the forward frame as to enable the driver to raise the runners out of the ground for turning about or for any other purpose, with a further arrangement for regulating the depth of the furrow or gash made by the runner.

The complainant's machine was a hand-dropping machine, and it was so arranged that a man could be mounted upon it so as to ride sidewise, and observe the lines or furrows which had been made across the field. Whenever the runners passed on these lines the seed was dropped. This was done by means of a connecting-rod between the seed-valves in the two hoppers, one end attached to each, with a lever to move it backward and forward by the hand of the dropper sitting crosswise on the frame, so that he could, by such movement, drop the seed from both hoppers at the same time at the intersection of the cross lines marked on the field.

The machine is shown with the dropman placed in his position in Figure 4, and the check-rows are seen extending

FIG. 4.

across the field. The machine was described with substantially these parts in the specifications and drawings attached to the original patent of 1853, as well as the several reissues 1036, 1037, 1038, 1039, and 1040.

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The improved machine, as patented in 1855, had two additional features, or improvements:

1. A vibrating valve, called a flipper-valve, in each seed-dropping tube, which valve is composed of a long slender slip of metal attached to a pivot in the middle, connected by a small attachment to a slide-valve having two openings, so that when the top is moved to one side of the tube the bottom moves to the other side. By one movement the seed drops through the slide-valve into one side, and is detained near the bottom till the next movement, when it is dropped on the ground, and seed is admitted simultaneously through the slide-valve into the other side. The two positions of the flipper-valve, slide-valve, and lever are shown in Figures 5 and 6. The effect of this arrangement is that the seed

FIG. 5.

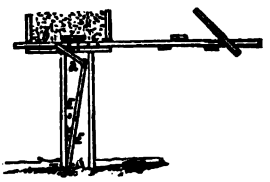
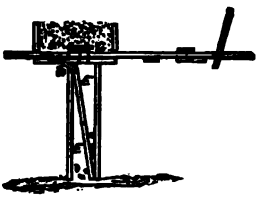


FIG. 6.



is near the bottom of the furrow when it is dropped, so that it is immediately deposited in line with the check-row. And the peculiarity of the apparatus is such that it requires but one movement of the levers above to drop for a single hill.

2. Another improvement was a high, long seat for the driver, on the rear frame, located above the wheels lengthwise of the machine, so that by moving backward or forward on the seat, his weight will raise or depress the runners.

The only claims allowed by the Patent Office upon the original application in the patent of 1853 were:

1st. "The oscillating horizontal wheels or distributors (namely, the valves before referred to), in the bottoms of the hoppers, having slots and holes of various sizes, in combination

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with the stationary caps and pins for the discharge of different kinds and quantities of seeds, as set forth in the specification."

2d. "The arrangement of the covering rollers, mounted as described, and performing the purpose of covering the seed, elevating the cutters in turning round, and also in adjusting to different depths, as set forth."

Other claims were applied for, but were disallowed.

The five reissues, or new patents, issued September 11th, 1860, in lieu of the original patent of August 2d, 1853, and of its first reissue in 1858, were for a number of supposed distinct inventions comprised in the machine, and each contained one or more separate claims. None of these distinct inventions were claimed as distinct features in the original patents, nor were they claimed as such in an intermediate reissue granted in 1858, but they are *shown* distinctly in the original drawings, and were described in the specification of the original patent.

The only claim allowed in the patent of May 8th, 1855, for the improvements added to the machine, was as follows:

"In combination with the hoppers and their semi-rotating plates *d*, the runners A with their valves *f*, and their adjustment by means of the levers and cams, and the driver's weight for the purpose of carrying and dropping seeds by each vibration of the lever D, and to regulate the depth of the planting, as described."

By the reissue of December 11th, 1860, this patent was subdivided into five new ones, each having one or more separate claims for supposed distinct inventions which were comprised in the drawings of the original patent, and in the descriptive part thereof.

Upon the first question, that of novelty, the defendants referred in argument to Cooke's well-known "drill," and other like machines described in the *Farmer's Encyclopædia*, and to an old machine of Joab Moffatt; but the principal prior machines relied upon by them as anticipating the invention found in Brown's patent of 1853 were the following:

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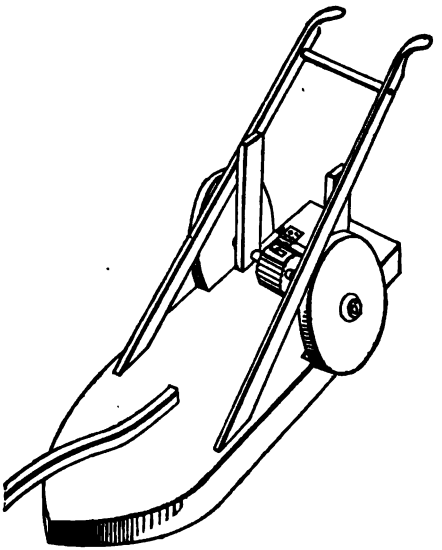
Statement of the case.—Anticipation.—Thomas, Todd.

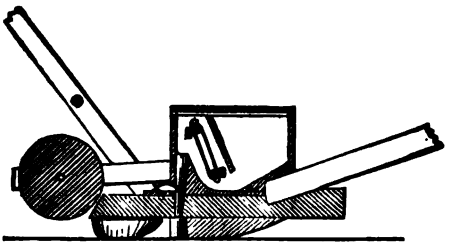
1. The cottonseed-planter of Thomas, patented in 1848, which the complainant contended was different from his corn-planter. This machine is described in the opinion of the court,* and illustrated at Figure 7.

FIG. 7.



2. Henry Todd's seed-planter, patented December 18th, 1848, which is also described in the opinion,† and illustrated

FIG. 8.



in Figure 8. The complainant contended that this was a different machine.

* *Infra*, pp. 206, 207.

† *Infra*, pp. 207, 208.

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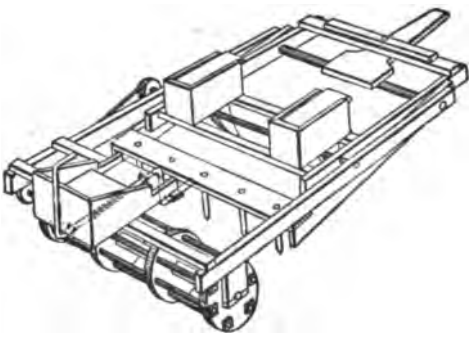
3. Earle's planting plough, patented in 1848. This, described in the opinion,* was an automatic corn-planter, and, as argued by the complainant, was wholly unlike his planter.

4. Mumma's seed drill. This, also described in the opinion,† was, however, not strongly relied upon by the defendants.

5. Remy & Kelly's machine. This machine is described by the court,‡ and is illustrated in Figure 9. For this a

FIG. 9.



patent had been applied for in June, 1850, but the application was then rejected and withdrawn. An experimental use of the machine was also proved.

Upon this condition of things, the question under this fifth machine was much discussed, as to what position, as a defence, a description of a machine contained in a prior rejected application occupied, and, if it was not a good defence by itself, how far it might be considered in connection with a prior experimental use in establishing an anticipation of a patented invention.

6. Three prior machines, of James Abbott, which were produced by the defendants. These, the complainant contended, were unsuccessful experiments, if indeed they were prior in date to his invention. The two principal of these

* *Infra*, p. 208. † *Infra*, p. 208. ‡ *Infra*, pp. 209–211.

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machines are described by the court,* and illustrated in Figures 10 and 11.

FIG. 10.

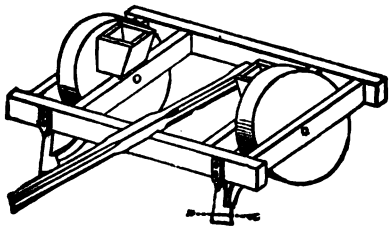
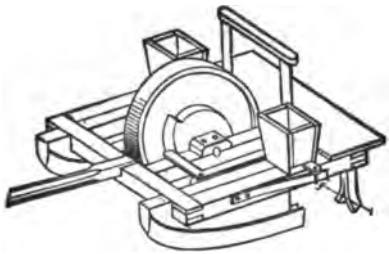


FIG. 11.



7. John Kirkman's unpatented machine. This was much relied on by the defendants; but the complainant contended that it was materially different from his corn-planter, in having but a single frame, in which were both runners and wheels, instead of two independent frames with runner and wheels like his. It was also insisted that on the evidence it was subsequent in date to his. It is described in the opinion of the court,† and illustrated at Figure 12, on the next page.

8. Joab Brown's corn-planter, said to have been used in 1850 and 1853, and another corn-planter for which he applied for a patent in December, 1852, were also adduced. The complainant contended that the machines of 1850 and 1853 were unsuccessful and abandoned experiments, and that the machine for which the said Joab Brown applied for a patent in 1852 was wholly unlike his, the complain-

* *Infra*, pp. 211, 212.

† *Infra*, pp. 212, 213.

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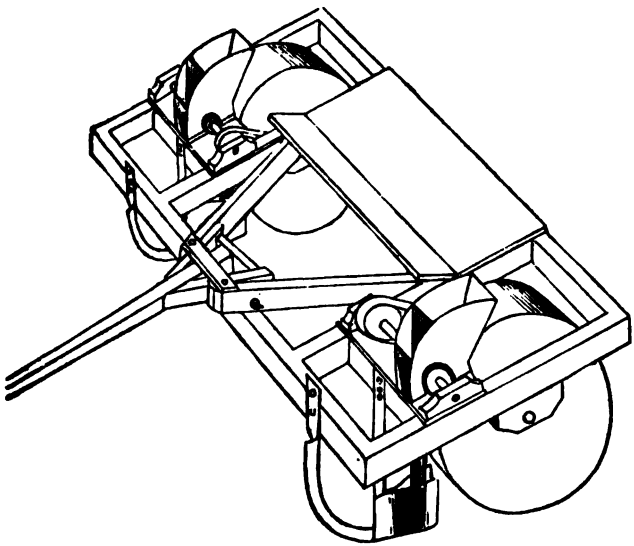
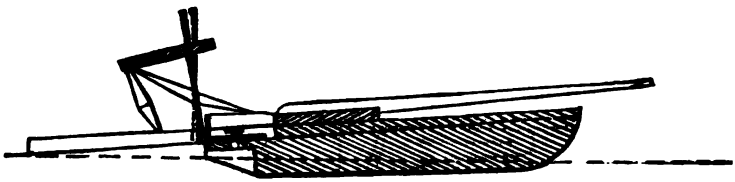
FIG. 12.



ant's, machine. This last machine of Joab Brown is analyzed in the opinion,* and illustrated at Figure 13.

FIG. 13.



Besides these, the defendants set up and relied upon the machine of Charles Finn and of Jarvis Case as containing the double-dropping device, claimed by the appellant in Reissue No. 1095.

The double-dropping devices in these two machines are described and illustrated in the opinion of the court,† and shown further on in Figures 23 and 24, page 200.

Upon the question of infringement there was much dis-

* *Infra*, pp. 214-216.

† *Infra*, pp. 283, 284.

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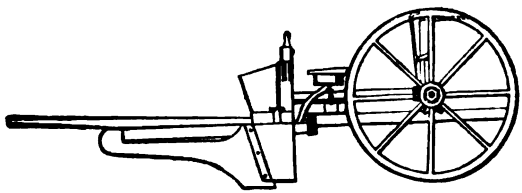
cussion. The conclusion arrived at by the court, in declaring the complainant's reissued patents 1037 void for want of novelty, and also the reissued patents Nos. 1091, 1092, 1093, and 1094 void, as not containing patentable novelty, obviates the necessity of here referring to the infringement of the several claims of those patents.

As to the infringement of the other claims, it was contended that the machine of the defendant Selby, and of the defendant Bergen, infringed the claim of Reissue No. 1036. That claim was in these words:

"CLAIM 1036. Having thus fully described the nature and object of my invention, what I claim under the patent is a seed-planting machine, constructed principally of framework, the front part of which is supported on not less than two runners, or shoes, with upward-inclining edges, and the rear part supported on not less than two wheels, the latter being arranged to follow the former, substantially as and for the purpose set forth."

The defendant Bergen's arrangement is shown, in side view, in Figure 14, and was thus described in his patent:

FIG. 14.



"The body of the machine consists of a frame B, *mounted on runners*, and a rear frame A, *mounted on wheels*, the two frames being united by a flexible joint, so arranged that it can be rendered rigid under certain circumstances."

The complainant contended that as the machine had two *distinct* frames, one frame resting on a pair of rollers, and the other distinct frame resting on a pair of runners or cutters, it was within this claim.

The defendants, besides insisting that this claim was an-

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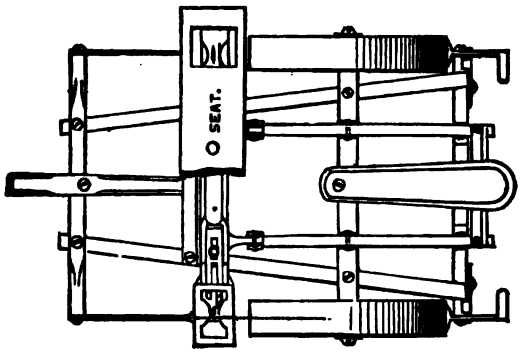
ticipated by Kirkman's machine, also contended that the Bergen machine did not infringe, inasmuch as the pivot or hinge was different and differently located.

The machine made by the defendant Selby is shown in Figure 15, and consisted of two distinct frames pivoted

FIG. 15.



together. One of these frames was supported on two runners and the other by two wheels.

The claim of the complainant, under Reissue 1038, was as follows:

"CLAIM 1038. Having thus fully described the nature and object of my invention, what I claim under this patent is, in combination with a seed-planting machine, constructed principally of framework, with not less than two runners and not less than two wheels, a hinge-joint between the point of the tongue and the rear part of the machine, so that one part of the framework may be raised, lowered, adjusted, or supported on the other part, substantially as described."

The mode of attaching the front and rear frame in the defendant Bergen's machine is shown in Figure 16, on the next page, and was thus described in Bergen's patent:

"I construct my seed-planter in two parts, consisting of two frames of equal width and suitable strength, coupled together. . . These frames are coupled together by a slotted joint at

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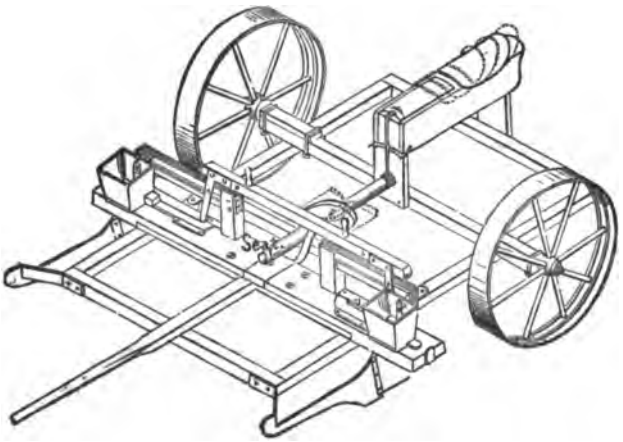
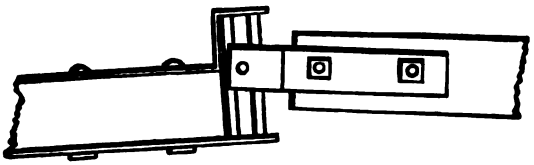
each side of the frame, to permit either frame to have a varying vertical movement without changing the position of the seed-tubes or varying the depth of the planting."

FIG. 16.



A peculiar hinge, shown at Figure 17, was employed by Bergen, and the appellees contended that Brown was to be limited to his peculiar hinge, and that Bergen's machine had a different hinge.

FIG. 17.



The arrangement of Selby, the other defendant, is shown in Figure 18. He also had two separate frames pivoted together, but the pivoting or hinging was effected by extending the rear frame forward and pivoting the front end of the runner to the projection of the rear frame. It was contended by the defendants that on this account, in the Selby machine, the two frames, although hinged, were combined together in a substantially different manner, and, therefore,

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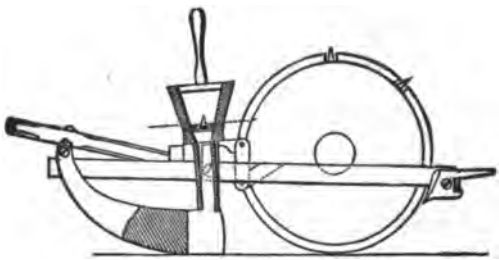
that it was no infringement. The complainant insisted that although the place of uniting the two frames together was different in the two machines, and the hinges were peculiar,

FIG. 18.



yet the pivoting of these frames together caused the combined action to be exactly alike.

The claim of Reissue 1039 was in these words:

"CLAIM 1039. Having thus fully described the nature and object of my invention, what I claim under this patent is in a seed-planting machine, wherein the seed-dropping mechanism is operated by hand or by an attendant, in contradistinction from 'mechanical dropping;' the mounting of said attendant upon the machine, in such a position that he may readily see the previously made marks upon the ground, and operate the dropping mechanism to conform thereto, substantially as herein set forth."

The complainant urged that this was not for the mere *putting of a seat* on the machine, but for so arranging the several parts that a dropman could be located in a position to see the marks on the ground, and work the seed-valves, and that in both the Bergen and Selby machines the same *arrangement* of the several parts of the respective machines had been made; that a man could be located there in a sitting position and do his work.

The arrangement of Brown's seat is shown in Figure 19, on the next page, and was between the two seed-boxes, and so that he could sit sidewise astride and observe the marks.

The Bergen seat was, in like manner, located between the

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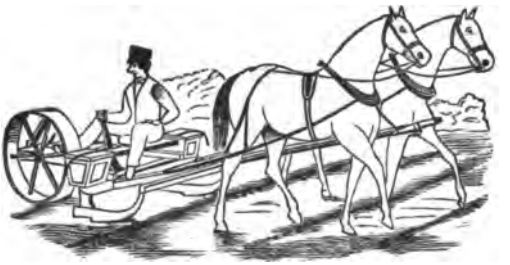
two seed-hopper boxes, and so that the dropman could sit astride of the seat and look sidewise across the field.

FIG. 19.



The arrangement for Selby's seat is shown in Figure 15,* and was in the same position as Brown's.

It was contended by the complainant that as no one had ever arranged the several parts of a corn-planter so that a man could sit upon the machine in a position to watch the marks on the ground and at the same time work the valves, the *manner of organizing* these several parts, by which he could sit there and work the valves, involved invention, and this was not like the mere putting of a *driver's seat* on a machine in positions where drivers' seats had been accustomed to be placed, for the mere purpose of driving the machine.

The opinion of the court, as already stated, dispenses with the necessity of reference to the question of infringement of the second group of reissues, except Reissue No. 1095.

The claim of the reissue 1095 was in these words:

"CLAIM 1095. Having thus fully described my invention, what I claim under this patent is, so combining with a lever, by which both may be operated, a valve or slide in the seed-hopper, and a valve in the seed-tube, as that a half-motion of the lever by the operator, riding on the machine by which they are operated, shall both open and close the seed passages at regular periods, and pass measured quantities only, substantially as described."

* *Supra*, p. 195.

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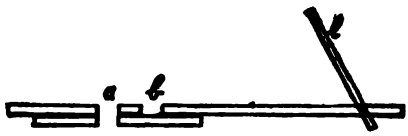
Statement of the case.—Double-dropping mechanism.

It was contended on behalf of the complainant that this was a claim for a combination, as shown in Fig. 20, consist-

FIG. 20.



ing of a lever *l*, a sliding valve in the bottom of the seed-boxes having two openings, *a* and *b*, and a vibrating valve in the seed-tube extending throughout the length of the seed-tube, which valve, when vibrated in alternate directions formed alternate passages in conjunction with the opposite sides of the seed-tube, so that when vibrated in one direction this seed-tube valve formed, with the side of the seed-tube, a passage *E*, which, in connection with the opening *b*, in the hopper-valve, caused the seed to descend into the seed-tube and be retained at the bottom of the seed-tube. When the lever was vibrated in the opposite direction, the valve in the seed-tube moved into the position *E'* (Figures 21 and 22),

FIG. 21.

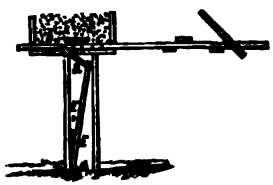
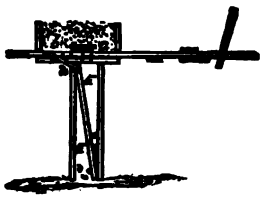


FIG. 22.



so as to open on one side a passage to the ground for the seed previously deposited in the seed-tube, and at the same time opened a passage for the seed through the seed-hopper slide-valve into the seed-tube, on the opposite side of the vibrating valve from that shown in the first position. The mode of combining their several elements, namely, the lever, the valve in the seed-hopper, and the valve in the seed-tube,

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was substantially similar to that of the complainant. So that the vibration of the slide-valve, at the bottom of the seed-hopper, caused the tube-valve to vibrate in proper relation thereto.

Two devices were set up as anticipating Brown:

1st. That of Jarvis Case, whose device, in its two positions, is shown in Figures 23 and 24.

FIG. 23.

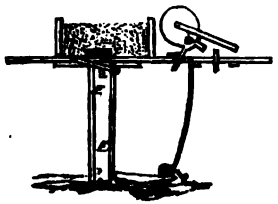
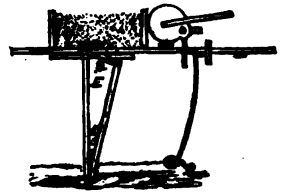


FIG. 24.



This machine was like Brown's, in that one muscular effect did the work of opening and closing the hopper-valve and seed-tube valve, but the seed-tube valve was not double-acting, and a spring returned it to its place, and the operator had to overcome the force of this spring.

2d. Finn's machine, which is shown in Figures 25 and 26.

FIG. 25.

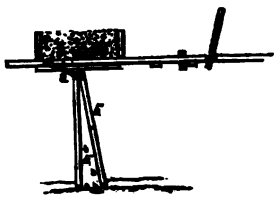
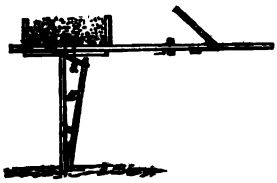


FIG. 26.



In this last-mentioned machine the seed-tube valve and hopper-valve were each only single-acting, and two motions of the arm of the operator were required in consequence for each deposit of seed. It was contended that Brown's machine differed from Finn's and Case's, in containing a lever in combination with a double-passage hopper-valve and a vibrating valve extending through the seed-tube, which

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vibrating valve was double-acting, in the sense of forming, with the opposite walls of the seed-tube, alternate passages on each side of the vibrating valve, with each half-motion of the operator's arm, thereby saving much labor.

The Bergen dropper and the Selby dropper agreed with Brown's, in having each a slide-hopper-valve having two passages, a double-acting vibrating seed-tube valve located within and extending the length of the seed-tube, which vibrating valve formed alternate seed passages for the grain to the ground, at *each* half-motion of the operator's arm. The Selby dropper had a lever in combination with these parts, and in the Bergen dropper a handle was substituted for a lever in this combination.

As already stated, the court below dismissed the bill of the complainant, and the present appeals were taken to such action.

Mr. George Harding, for the appellant, contended that the Brown Corn-planter was composed of two separate frames; one supported on *not less* than two wheels, and the other on not less than two runners. That by reason of this fundamental organization, it followed—

1st. That the wheels should follow and cover in the seed.

2d. That a hinge connection could be made between the two frames so as to permit conformity to the unevenness of the ground.

3d. That a dropman's seat could be carried on the machine.

4th. That a lever could be fulcrumed on the rear or wheel-frame and attached to the front or runner frame, whereby the front runner-frame could be elevated to turn corners, &c. These several features, or rather the several arrangements of mechanism producing them, were made the subjects of several distinct reissues, Nos. 1036, 1038, 1039.

The following points, among others, were made by the appellant:

The reissuing of patents, in severa distinct reissues instead of one reissue, is a matter within the discretion only

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of the Commissioner of Patents. This point was decided by this court in *Bennet* v. *Fowler*.*

The several features or devices claimed in the reissues of the original patents, although not claimed in the original patent, were described therein, and the rule was thus laid down in *Seymour* v. *Osborne*† by this court:

"Power is unquestionably conferred upon the commissioner to allow the specification to be amended if the patent is inoperative or invalid, and in that event to issue the patent in proper form; and he may, doubtless, under that authority, allow the patentee to redescribe his invention, and to include in the description *and claims* of the patent, not only what was well described before, but whatever else was *suggested* or substantially *indicated* in the specification or drawings which properly *belonged to the invention* as actually made and perfected."

Under this decision it is only necessary for the appellant to show that the subject matter of each claim of the several reissues is set out or exhibited in the drawings and description of the original patent, and it is for the court to compare the original and reissued patents to ascertain that fact.

As to the legality of claims in the form contained in reissues 1039, 1091, and 1092, and as to the construction of the claims of the reissues generally, the counsel referred to *Seymour* v. *Osborne*,† *Roberts* v. *Dickey*,‡ *Seymour* v. *McCormick*,§ *McCormick* v. *Talcott*.‖

As to what is required in a prior invention to defeat a patent, and as to prior public use, to *Whitely* v. *Swayne*,¶ *Agawam Company* v. *Jordan*,** *Seymour* v. *Osborne*,†† *Washburn* v. *Gould*.‡‡

As to the certainty required in establishing the nature of an alleged prior invention, and in fixing its date, to *Wood* v. *Cleveland Rolling Mill Company*,§§ *Parham* v. *Buttonhole Company*,‖‖ *Hayden* v. *Suffolk Manufacturing Company*.¶¶

* 8 Wallace, 445; and see Pennsylvania Salt Manufacturing Co v. Gugenheim, 8 Fisher, 423; also Battin v. Taggert, 17 Howard, 80.

† 11 Wallace, 516. ‡ 4 Fisher, 582. § 19 Howard, 96. ‖ 20 Ib. 402.
¶ 7 Wallace, 685. ** Ib. 583. †† 11 Id. 552. ‡‡ 8 Story, 122
§§ 4 Fisher, 559. ‖‖ Ib. 468. ¶¶ Ib. 98.

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Opinion of the court.—Anticipation.—Date of Brown's invention.

As to modifications of prior devices to convert them into the patented improvement, to *Wood* v. *Cleveland Rolling Mill Company*.*

As to what constitutes infringement and the doctrine of equivalents as applicable thereto, to *Seymour* v. *Osborne*.†

Messrs. S. S. Fisher, S. B. Gookins, and J. H. Roberts, contra, argued—

That the appellant's reissued patents were void, because professing to be improvements in seed-planters they did not clearly set forth in what the improvement consisted, nor distinguish what was new from what was old.

That the claims of the several reissues were not for *separate* and *distinct* parts of the machine or invention.

That the reissued patents were not for the same *invention* which was claimed in the original patent.

That the application of Remy & Kelly, filed in the Patent Office, was a full anticipation of Brown's reissued patents 1038 and 1039, and defeated them.

That the other machines and patents adduced as prior to Brown, together, fully anticipated him upon every material thing contained in his reissued patents.

That the first claims of the reissued patent No. 1039, and of the several reissues of the patent of 1855, especially 1095, were for a result, and therefore not patentable.‡

Mr. Justice BRADLEY delivered the opinion of the court.

A proper decision of the questions in these causes renders it necessary, in the first place, to ascertain, as near as may be, the actual date of Brown's alleged invention or inventions, such as and whatever they are. His original application for a patent was sworn to on the 27th of September, 1852. But it appears from his own testimony, which does not seem to be discredited, but rather corroborated by others, that he was making experiments in 1850, on a ma-

* 4 Fisher, 559. † 11 Wallace, 516.

‡ Sickles v. Falls Co., 2 Fisher, 202; Sangster v. Miller, Ib. 563; Carr v. Rice, 1 Id. 325.

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chine which formed the nucleus of his completed invention. He further says that in January or February, 1851, he made a machine which he describes as follows:

"It had two runners and two wheels, two cross-bars and nose-pieces, two braces, dropper's seat, and a tongue. The wheels were hung through the seed-boxes by arms. There were arms running back from the seed-boxes, which the wheels run in, coupled through the seed-boxes with a bolt. I had a loop running down each side of the wheel that went on to the axles on the wheels, and worked a couple of short levers fastened on this loop running forward under the forepart of the machine, and running back far enough to put a cross-piece on behind. I am a poor hand at describing it. The seed-slide passed through the hoppers, running from one to the other, and the lever operated it with the hand, with a person located on the machine crosswise, so that he could see the marks plain on the ground."

Further evidence was given by him descriptive of the machine, and showing its substantial identity with the machine as it stood when the patent was granted.

This, however, was only a model. But it had all the main characteristics of the perfected machine, except that the circular valves were not contained in it, the seed being dropped from the bottom of the hopper by the movement of a straight slide. He further testified that in 1852 he sent that model by his brother to Washington, and that it was very nearly the same as the model filed in the Patent Office, a copy of which was shown to the witness, and is an exhibit in the cause. He further states that in the same year he made, after the plan of the model, a machine of one-half the usual size, but large enough to work with, and that he planted three or four acres of corn with it in May, 1851. He says it worked well. In September of the same year, after harvest, he invited several persons to come and see it operate, giving their names. Several of these witnesses were called and fully corroborated his testimony. Early in 1852 he commenced constructing ten machines, but completed but one of them that spring. With this one, and the half-sized machine before mentioned, he planted over twenty

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acres of corn, namely, sixteen for himself and eight for Allen Brown. At this time, he says, he introduced into these machines the circular valves, or dropping plates, in place of the slides, thus completing the machine as it stood when he applied for his patent and made the model now before us, which was during the same season. The following spring, 1853, before corn-planting time, he had completed a dozen machines containing all his improvements, and sold them to various persons. Some of them, he says, planted as much as three hundred acres of corn. These machines, he says, contain the high seat and flipper-valve, which were the subject of the patent dated May 8th, 1855.

The appellees have endeavored (but we think unsuccessfully) to discredit the statements and testimony of Brown, especially as to the existence of rollers for covering the seed in the model and small-sized machine made in the early part of 1851. He is corroborated on this point by his nephew, V. R. Brown, and others; and nothing but negative testimony is adduced to the contrary.

We think it clear that his machine (except the seat and the flipper-valve) was substantially invented in the beginning of 1851, and that in April or May of that year he had constructed and used a small working corn-planter, containing all the material parts of his machine as it was when patented, except the circular valve in the hopper, which was added as an improvement on the straight slide in the spring of 1852.

We will next proceed to inquire what machines belonging to the same general class had been invented prior to this period, in order to show the state of the art at that time.

It cannot be seriously contended that Cooke's drill, and other machines of the kind, described in the *Farmer's Encyclopedia*, bear any resemblance to the specific features of Brown's corn-planter. The furrows are made by coulters fixed in beams, and the grain is covered by harrows following the drills. The latter are hollow tubes which are supplied with the seed grain by a revolving cylinder having little cups, or cavities, in its surface, which become filled as they revolve in the bottom of the hopper.

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Opinion of the court.—Anticipation, Moffatt, Hornsby, Thomas.

It is hardly necessary to consume time in reference to the alleged invention of Joab Moffatt, in or about the year 1834, models of which, made from the supposed recollection of witnesses, have been presented to the court. Moffatt himself was placed on the stand, and swears that he has no recollection of having ever invented such a machine. And it is a little singular, if he did invent such a perfect machine as the models represent, approaching so closely in every particular to Brown's corn-planter, that it should have gone into total disuse and oblivion. The general aspect of the evidence relating to this supposed machine, and some remarkable individual features which it exhibits, are sufficient to justify us in throwing it entirely out of the case.

An English patent, obtained by one Hornsby in 1840, was introduced; but the mechanism described therein has very slight resemblance to the corn-planter. It consists of a hollow wheel, with angular compartments and doors in the circumference to receive seed and manure from a hopper, and deposit them on the ground by the revolution of the wheel. This wheel is situated in rear of a coulter running in the ground, and does not touch the ground itself, but is supported on the frame of the machine, which in turn is supported by large driving wheels on the outside of the frame. The coulter and deposit wheel are located in the inside of the frame. The inventor, however, observes that more than one coulter and deposit wheel may be used. No method is described for covering the seed or pressing it into the ground. The side view of the coulter exhibited in the drawing bears some resemblance to the runner in Brown's machine; but we have no other description of it, or of the manner of its operation.

Thomas's cottonseed-planter, patented in 1841, is next adduced.* It consists of a long bed-piece of plank, supported by two wheels, one on each side, and having a sort of keel underneath, running along the middle, for making a crease or furrow in the ground, and keeping the machine in a

* See a drawing of it, *supra*, p. 190, Fig. 7.

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direct course. In the middle of the bed-piece, over the axle of the wheels, is an aperture to allow a seed-roller affixed to the axle to revolve, having alternate ridges and seed-holes. Over this is a hopper, which holds the seed and communicates it to the seed-roller, by whose revolution the seed is dropped into the furrow. A loose flap is hinged to the rear end of the bed-piece, and drags along on the ground, for covering the seed with earth. The keel in this machine bears some resemblance to the runner of the corn-planter. This patent requires no further observation. It exhibits a semblance only of one or two elements of Brown's machine.

The next machine in order of time is Henry Todd's, of Oxford, New Hampshire, patented December 15th, 1843.* It is thus described by the witness, Hale: "The main portion of the machine consisted of a plank or surface-board, three or four feet long, one foot wide, and tapered to a point in front. The seed-box was fastened to said plank. The seed was distributed by cups upon a belt, upon the principle of a flour elevator; the motion was communicated by band from a roller at the rear of the machine, said roller also serving to press the earth over the planted corn. A cutter was fastened to the bottom of said plank, for opening a drill for dropping the seed, and a couple of converging wings fastened to the rear and bottom of said plank for covering the seed. The cutter before mentioned had an upward incline in front, and at the front was thin and sharp, spreading out at its rear end." The machine was managed much like a plough, having two handles. The roller in the rear was connected with the front part of the machine by two arms, one on each side, in which were situated the bearings of its axle, and the forward ends of which were, by pivots or bolts, attached to supports, so that the roller could rise and fall independently of the surface-board or platform of the machine. It resembled Brown's machine in having a cutter (or runner) for making a furrow, in dropping the seed through a cleft at the rear of the cutter, in having a roller

* See a drawing of it, *supra*, p. 190, Fig. 8.

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to press the earth upon the seed, and in having a free connection between said roller and the machine. It differs from it in having but one cutter (or runner) and one roller; in having a pair of winglike scrapers behind the runner to cover the seed with earth; an automatic feeding apparatus incapable of dropping the seed in check or cross-rows; and having no levers, and nothing but the plough-handles to lift the cutters out of the ground.

Hale was the only witness examined on the subject of this machine. He says he helped Todd make six of them, and that they were used, and worked satisfactorily, in or about 1844. This being all that is heard of this machine in the cause, it is probable that its use was discontinued, and that it shared the fate of a thousand other devices which approach the point of final perfection and success, but do not reach it. The differences between this machine and Brown's are just those differences which rendered the latter a success, and a valuable acquisition to the agriculture of the country.

Earle's planting plough, patented in 1848, may be dismissed even more summarily than Todd's machine. It operated automatically in depositing the seed, and was not adapted to check-row planting; the furrow was opened by a plough furnished with a double mould-board; and the seeds were covered by means of scrapers attached to a diagonal position behind the seeding apparatus. It had but one frame, and the seed was deposited by means of a drum, having cavities in its surface, revolving in the bottom of the hopper, and discharging the seed into a tube behind the plough.

Mumma's patent for a seed-drill, granted in 1849, was also put in evidence; but it describes only a grain-drill, devised to secure a more equal distribution of seed in the drills or furrows in ascending or descending hills, &c. "To the hindpart of the frame a small trunk is jointed, with a long lever attached to it, by which the whole seeding apparatus is raised from the ground when it is transported from place to place." This device of the truck or jack and lever for

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prying up the machine when being turned or transferred from one place to another, bears some resemblance to Brown's method of raising the front frame of his machine by the levers resting on the drums or wheels. The patent is probably introduced to show this resemblance. It is so slight, however, that it can have no serious effect in the cause.

The machine of Remy & Kelly comes next.* They applied for a patent in June, 1850, but withdrew the application in August, 1850; for what cause does not appear. We have before us a copy of the application and accompanying drawings and models of the machine, and the examination of Remy and one Burgess in reference thereto. The machine consisted of a front, middle, and rear frames, or parts, the former being mounted by two seed-boxes or hoppers, and being furnished below with two drill-teeth, which cut or scratched the usual small furrow in the ground, and through which the seed was deposited in the earth. Small rollers with cavities in their surfaces were made to revolve in the bottom of the seed-boxes, and thus carried out and deposited the seed in the drill-teeth in the usual manner of drills.† The drill-teeth were followed by a transverse row of upright harrow-teeth for covering the grain. These harrow-teeth were inserted in a cross-bar framed into two long levers which were attached to the forepart of the front frame by a loose joint. This apparatus constituted the middle frame. The rear frame was also attached to the front frame by a loose joint, by means of side bars, extending forward and connected thereto by bolts or pins, and was supported on a transverse roller consisting of four wheels or bulkheads, and iron bars connecting them together, making a sort of rolling crate, which rested on the ground, supported the driver's seat, and by means of bands and pulleys gave a revolving motion to the seed-rollers before mentioned. An iron crank within the driver's reach, and fitted in bearings on the rear

* See a drawing of it, *supra*, p. 191, Fig. 9.

† These rollers were shown only in the model. They do not appear in the drawing on page 191.

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frame, enabled him to pry up the cross-bar holding the harrow-teeth, and with it the rear end of the front frame with the drill-teeth. This operation, as the tongue was fast and rested on the horses, raised the cross-bar and the rear end of the front frame so as to lift the drill-teeth and harrow-teeth out of the ground. In this respect it produced, by means somewhat different, a result similar to the lifting of the front frame and runners by means of the levers acting on the fulcrum of the wheels in Brown's machine. Only one machine, however, was ever made, and this was made merely for an experiment, in Brookville, Indiana, in the year 1849. It did not contain the pulley-strap for turning the seed-rollers, which the application and model exhibit as part of the invention. Remy, in trying the machine, walked alongside of it, and, with a crank, gave the seed-rollers an oscillating motion with his hand, Burgess driving. In this way they planted five acres, which Remy says were planted even and cultivated both ways. But the machine was never used again and was afterwards broken up, and no other was ever made. Remy made many other corn-planting machines on a different principle, but he said there was no demand in that region for a machine of this kind.

The appellees contend that this was an anticipation of several material parts of Brown's machine. But it is obvious that it had not the runners nor the covering rollers, nor was it adapted to planting in check-rows. As presented to the Patent Office in 1850, and in the models exhibited to the court, it was planned for an automatic drill-planter. The experiment made in 1849, when Remy worked it by hand, was a mere experiment, which was never repeated. It may have presented one or two ideas in advance of other machines, but it can hardly be said to anticipate the machine which we have described as Brown's. Were it not for the application for a patent it would justly be regarded as an abandoned experiment, incapable of being set up against any other claim. Can the fact that such an application was made and afterwards voluntarily withdrawn, and never renewed, make any difference? We think not. Had

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a patent been actually granted to Remy & Kelly, it would have been different. The case would then have come directly within the seventh section of the act of 1836, which makes a "patent" or a "description in a printed publication" of the invention claimed, a bar to a further patent therefor. But a mere application for a patent is not mentioned as such a bar. It can only have a bearing on the question of prior invention or discovery. If upon the whole of the evidence it appears that the alleged prior invention or discovery was only an experiment and was never perfected or brought into actual use, but was abandoned and never revived by the alleged inventor, the mere fact of having unsuccessfully applied for a patent therefor, cannot take the case out of the category of unsuccessful experiments.

The next machine which we will examine is that of James Abbott, which is strenuously claimed as an anticipation of the complainant's machine, or of material parts thereof Abbott resided in Brimfield, Peoria County, Illinois. Models of his machine are in evidence.* No public description of it is produced. No patent was ever applied for by Abbott. He made his first machine in 1846, having one frame and two coulters. The seed was dropped behind the coulters, and the wheels of the machine passed over it. The coulters would clog, and he soon abandoned the machine. In 1848 he made another and put it in operation.† Instead of coulters he now used runners, something in the form of a sled runner, with wings behind to widen the furrow and make a place for dropping the seed. One of the runners was produced on the trial. It was made of wood and shod with iron. The machine had but one frame, and only one wheel, which was in the middle between the runners. On each side of the wheel were cams to operate L levers, which worked into the bottom of the seed-boxes and dropped the corn behind the runners. The seed was covered by scrapers or wings which followed the runners. Behind the wheel

* See a drawing of it, *supra*, p. 192, Fig. 10.

† See a drawing of it, *Ib.*, Fig. 11.

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and runners there was a platform on which the driver stood, and by stepping backward or forward he could slightly elevate or depress the runners. This machine was automatic, a mere drill, and had nothing but the runner in common with Brown's machine.

Abbott then says:

"The next machine which I constructed was, according to the best of my recollection, in the spring of 1852, certainly not later than 1853."

He then proceeds to describe the machine. It had but one frame, and whilst it exhibited some of the same parts which are found in Brown's machine, yet it is obviously a different machine from Brown's, and intended as an automatic drill instead of a check-row planter. But as, in our judgment, the weight of the evidence (of which considerable was taken) is that it was constructed subsequently to Brown's, it is unnecessary to give it further consideration.

Another machine much relied on by the appellees was that of Kirkman, of Peoria County, Illinois, a farmer, but formerly a millwright and engineer.* He lived in the same neighborhood as Abbott, and the latter, in his evidence, says that after he had made a drawing of his last machine (above referred to), Kirkman was at his house and took a rough sketch of the drawing, and soon after made a machine nearly like it, in which he had broad iron wheels. The character of Kirkman's machine is very explicitly shown, exact models of it and one of the actual runners being produced. It was composed of a single frame standing on two runners in front, and two wheels following the runners in the rear. The seed was placed in boxes or hoppers over the rear end of the runners, and was let down to the furrow through a tube inclosed in the rear of the runners by means of an automatic device operated by gearing connected with the wheels. Between the wheels was a platform on which the driver sat or stood. By stepping backward or forward on this platform, and changing the position as to the bearing on the axle of the

* See the drawing of it, *supra*, p. 198, Fig. 12.

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wheels, the machine could be tipped up or down in front so as to raise or depress the runners. This action was facilitated by the tongue being freely attached by a bolt between the hounds so as to admit of a hinged motion. A cross-bar screwed to the top of the hounds above and the front cross-bar of the machine below the tongue limited the movement thus produced, and also regulated the depth of furrow. In the machine as first constructed a seat was rigged in the rear of the platform for the driver, by moving on which, backward and forward, the same tipping process could be produced. This was afterwards abandoned.

It will thus be seen, that Kirkman's machine had some of the prominent features of Brown's. It differed from it in not being a check-row planter, and not planting in hills but in rows, and acting automatically simply as a drill, and having but a single frame.

Considerable evidence, much of it apparently conflicting, was adduced as to the time when Kirkman's machine, or rather several machines (for he built three at different times), were constructed. [The court here stated and examined this testimony, as to date, and continued.]

A review of the entire evidence on the subject leads us to the conclusion that Kirkman's second machine, called the Wrigley machine, was made in the early part of 1850; that he tried it that spring unsuccessfully; that he then laid it by, and did not attempt to use it again until the spring of 1852, after he had made a material alteration in it—which alteration was made after the summer of 1851—and not completed, as it would seem from the evidence of Kingsley, until the spring of 1852. This would make the machine of Kirkman about contemporary with that of Brown's second machine, which he completed and operated in the spring of 1852; but would bring it, as a completed machine, subsequent to the half-sized machine which Brown completed and operated in the spring of 1851, and publicly exhibited in September of that year.

The machine referred to by Abbott, as having been made by Kirkman by the aid of drawings furnished by him, was

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most probably the third machine made by Kirkman, in 1856, which is the only one made by him having iron wheels.

The last machines relied on as antedating the appellant's are those of Joab Brown, also of Peoria County, Illinois.* According to his testimony, he was experimenting on the subject in 1849, 1850, and 1851. In 1849 he made a machine with one runner placed under a plank. It bore no resemblance to the appellant's machine except as to the runner, and it did not work satisfactorily. In the spring of 1850 he made a second machine, having two runners and two wheels running behind them, to cover the seed, and a third wheel, larger than the others, situated forward in the middle, for the purpose of working the apparatus for dropping the seed. It was intended as a check-row corn-planter, and was tried for that purpose, but failed; and what was planted with it was planted only in single rows. It was afterwards abandoned. As Brown says, "It became common stock in my lumber yard." In the same year, 1850, Joab Brown made another machine, or, as his son says, two of them, with two runners each; but they had no wheels running behind the runners to cover the corn. They had an iron shaft running through the hoppers, with an apparatus for taking up and dropping the seed; and this shaft had a wheel at either end, outside of the machine, for giving it a revolving motion. This machine had a seat for the driver, but only one frame, and the tongue was bolted fast to that, so that there was no means of tilting the runners out of the ground. Joab Brown says that he altered this machine, in the spring of 1851, by changing the seeding apparatus. He removed the shaft and substituted lever-bars with slides entering the hoppers, and an upright lever extending above the seat, for working the bars. He thus placed a dropper as well as the driver on the seat. In 1853 he placed the wheels so as to run behind the runners. As thus finally altered it bore some resemblance to the appellant's machine

* See a drawing of the principal one, the last, *supra*, p. 198, Fig. 13

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in certain particulars. It is true, it had but a single frame, with no hinged joint, and could not be tilted out of the ground; the driver and dropper had to dismount in order to turn around; nevertheless it had a dropping device worked by hand by an attendant who dropped the seed in check-rows, and had a seat for both driver and dropper, and had runners and wheels running behind them to cover the seed. It was not thus completed, however, until 1853, long after the construction of appellant's machine. In the spring of 1851 Joab Brown made two other machines. One was a two-rowed machine with a single frame, having two runners, followed by two rollers; but, as Joab Brown himself says, working automatically "as a drill-planting machine." "We left off the lever entirely," he says, "and depended on the wheels to do their own dropping." His son says that it was also arranged to be worked by a hand-lever by an attendant on the machine. A model was put in evidence, which, as the son says, represents substantially this machine, but according to Joab Brown's own testimony, this model represents the machine which was altered in 1853. Its features are substantially as before stated. Affected by this degree of uncertainty as to character and date, it must be received with caution, even on those points on which it presents resemblances to the appellant's machine. Joab Brown constructed another machine in the spring of 1851, which presents, as he considered, the final and most perfect form of his inventions. It consisted of a single frame, with three runners and no wheels; a seat on the machine for the driver and dropper, and an apparatus worked by a hand-lever for dropping the seed in check-rows. A model of it was given in evidence. Joab Brown applied for a patent for this machine December 31st, 1852, but subsequently withdrew the same. He says he conceived the idea of the machine in the early part of the spring of 1851, and completed it about the 1st of May, and used it for planting corn, planting about two hundred acres that spring. There is some evidence that this machine was made at an earlier date; but the weight of evidence agrees with this testimony of Joab

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Brown. Its likeness and unlikeness to the appellant's machine are apparent from the above description. The apparatus for covering the seed consisted of a fan-shaped flange or tail projecting behind the runner. One of the persons who used it says that he had to follow behind to cover the seed, some of which would remain uncovered where the ground was uneven. Only the single machine above mentioned was made until 1853, when Joab Brown says he had about forty of them made, and sold them to various parties. In a letter to the Patent Office, of August 5th, 1853, urging his application for a patent, he refers to this machine as being the crowning result of seven years' experiments. He evidently regarded his other machines as experiments, or at least as secondary in importance and usefulness to the last machine.

A machine of one Farley, invented in January or February, 1853, was introduced in the case for the purpose of showing that Brown's improvement of placing the driver on the machine, which formed one of the subjects of his second patent, had been anticipated. There was a long platform on Earle's machine, the front part resting on and fixed to the runners, the rear resting on the axle of covering wheels following the runners. The driver rode on this platform, and by stepping forward he could press the runners deeper into the gound, and by stepping back he could raise them out of the ground, using the wheels as a fulcrum. The bearing of this machine on some of the reissued patents will be noted hereafter.

On the subject of the flipper valve (so called), the appellees have introduced two machines, one by Charles Finn, for which he applied for a patent in April, 1852, but which application was rejected; and the other by Jarvis Case, for which he applied for a patent December 9th, 1853.

These devices will be examined hereafter, when we come to consider the claim for the flipper valve as contained in the reissued patent No. 1095 (see *infra*, page 233).

We have thus gone over and explained, as well as the

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subject will admit, the various machines and inventions which constitute the history of the special art under consideration, up to the time that Brown's machine was produced. In the light of this review we are to determine the extent and character of his various patents and claims, and how far they are valid or void.

It is very obvious, at a glance, that the claim of reissue No. 1037, which is for the construction of a shoe or runner for seed-planting machines generally, cannot be sustained. That device was used long before Brown made his machine. Without adverting to Thomas's cottonseed-planter, it was contained in Todd's patent in 1843, and was used by James Abbott in 1848, by Kirkman in 1850, and probably by Joab Brown in the same year and the year before. There is nothing in the particular form and shape of the appellant's runner which is sufficiently diverse from others that preceded it, to entitle it to the merit of an invention.

Most of the other claims are more complicated, and require more careful consideration to understand their fair scope, in view of what had been accomplished before. It may be remarked in passing that, in our view, the several reissues are for things contained within the machines and apparatus described in the original patents; but whether they were anticipated by prior inventions, or are void for any other reason applicable to patents and claims generally, is still open. The question of fraud in obtaining these reissues must be regarded as settled by the decision of the Commissioner of Patents.

The first patent in the series of reissues is No. 1036, by which is claimed as the invention of the appellant a "seed-planting machine, constructed principally of framework, the front part of which is supported on not less than two runners or shoes, with upward-inclining edges, and the rear part supported on not less than two wheels, the latter being arranged to follow the former, substantially as and for the purpose set forth."

The machine is so constructed that an additional pair of wheels may be attached to it for the purpose of dropping

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the seed automatically where the nature of the soil is such as to render this method admissible in check-row planting. But with that aspect of the machine we are not at present concerned, except as it affects the general description of the machine as a whole. The specification describes the manner of its construction and operation for both automatic planting and hand planting. It is in its latter aspect that we shall principally examine it.

The last clause of the above claim, "*substantially as and for the purpose set forth*," throws us back to the specification for a qualification of the claim, and the several elements of which the combination is composed. The thing patented is not only, first, a seed-planting machine, made principally of framework; but, secondly, it is composed of two distinct parts; thirdly, the front part is supported on two or more runners with upward-inclining edges; fourthly, the rear part is supported on two or more wheels, arranged to follow the respective runners; and each and all of these parts are to be thus constructed and combined "substantially as and for the purpose set forth." That is to say, the object and purpose of the machine as a seed-planting machine is explained to be to plant corn in check-rows, so that it may be cultivated both ways, and its construction is adapted to that end. The devices used for effecting this purpose, both automatically and by hand, are described in the specification, but they are claimed in separate patents, and only affect the one in question as they modify and affect the general structure of the machine. Again, the object and the purpose of constructing the machine of framework in two distinct parts, supported separately, one by the runners and the other by the wheels, is expressed to be "so that the rollers may rise and fall without disturbing the runners, or so that the runners may yield or move independently of the rollers." The particular manner of connecting the parts, although described in the specification, is the subject of a separate patent. Again, the object and purpose of the runners and wheels or rollers, the latter arranged to follow the former, is set forth, the former to make a furrow for the seed, the

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latter to "close up and press the earth down over the seeds." The adaptation of the machine, and the several parts mentioned, to these several objects and purposes, is thus made a part of the combination of elements called for and made requisite in the claim under consideration.

The claim thus limited is considerably narrowed in its operation. It is substantially for a combination of the material parts of the entire machine, and no one can be said to infringe it who does not use the entire combination.

The first question to settle is, whether, as thus limited and restricted, the patent is valid, or whether the invention, as thus patented, was anticipated by prior inventions.

It is obvious that we may lay out of the question all seed-drills. They were not constructed for the specific purpose for which this machine was constructed, namely, to plant corn in check-rows, and had not the apparatus adapted to such a purpose. The plough-shaped drill of Todd, though it had a cutter under the front part and roller drawn behind for covering the grain, was only a step in the right direction. It was a mere drill, planting in single rows, and not adapted to plant in check-rows; and it was handled and operated in an entirely different manner from Brown's.

Earle's, Mumma's, and Remy & Kelly's inventions may also be dismissed without observation. The description of them heretofore given shows that they were mere drills, that they had no covering-wheels, and were not constructed for, or adapted to, the purpose for which Brown's machine was made. Besides, as before seen, the machine of Remy & Kelly was a mere experimental one, abandoned by the inventors. We may also lay out of view Abbott's drill, constructed in 1848, the only one that can by possibility be brought into the case. That had no covering-wheels, had but one part or frame, and was not a check-row planter. Kirkman's machine also had but a single frame or part; was a mere drill, not planting in check-rows, nor even in hills. Besides, as a machine, it was incomplete and unfinished until the alteration which was made in it in 1852, when it was first rendered capable of practical use.

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It is urged by the appellees that all those parts of Kirkman's machine which were completed in 1850, and not subsequently altered, should be considered as perfected, although the machine, as a whole, was not perfect, and did not subserve the expectation of the inventor until the alterations were made in the seeding apparatus in 1852. It is undoubtedly true that a subsequent inventor could not claim as his original and first invention the separate parts of which Kirkman's machine consisted, and which worked satisfactorily after the machine was perfected. This would prevent the appellant from claiming as his invention the several parts of which Kirkman's machine consisted; but it would not prevent him from claiming such new combination of those parts with devices of his own as would result in a useful and satisfactory machine adapted to the purposes of its construction.

The machines of Joab Brown which are more or less relied on, were all composed of single frames entirely rigid. The machine with one runner, constructed in 1849, was a failure, and is not pretended to have been at all like the appellant's. The machine with two rollers and one large wheel, constructed in 1850, was automatic, could only plant in rows, so as to be worked one way, and failed entirely as a check-row planter. The other machine or machines, constructed in 1850, had rollers, but these did not follow the runners until altered in 1853, and were not used for covering the corn, but for turning a shaft in the hoppers by which the seed was dropped. This is clearly proven and is shown by their thickness, which was little over an inch. They were abandoned for the three-rowed machine without rollers, which was built in 1851, and for which Joab Brown applied for a patent in December, 1852. It is apparent that none of these machines anticipated the appellant's machine as containing the particulars combined in the claim of the reissued patent No. 1036.

This patent, therefore, construed and limited in the manner before stated, we hold to be valid.

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The next question is whether, as thus construed, the patent is infringed by the defendants. It needs but a glance at the defendant Bergen's machine, a large model of which is produced in court, to see that it has all the essential characteristics of the appellant's machine.* It is a seed-planting machine, made principally of framework, composed of two distinct parts, the front part supported on two runners, or shoes, with upward-inclining edges, and the rear part supported on two wheels, the latter being arranged to follow the former, and the whole and each part constructed and put together for the purpose and substantially in the manner as is done in Brown's machine, and according to his specification. The only pretence on which it can be claimed to be different, is that the "framework" of which it is constructed is not the kind of framework described by Brown in his specification, namely, "without gearing, without spoked wheels, and other expensive fixtures, and resembling a drag or sled more than it does a carriage or wagon in its main or general construction." By this description, Brown was evidently attempting to show how simply and cheaply the thing could be made, not that it was to be confined to that specific form. It might as well be contended that he intended to confine his invention to wood, and that a machine made of iron or other metal, though made in precisely the same form, would not be an infringement, because it would not have the same quality of cheapness and simplicity which he describes. In fine, we do not understand Brown as limiting his invention to this cheap form, but as showing how cheaply and simply it would bear to be constructed. This, we think, is the fair meaning of his language when taken in connection with the whole specification. A literal construction is not to be adopted where it would be repugnant to the manifest sense and reason of the instrument.

The machine of Selby, which is the subject of the suit of *Brown* v. *Selby and others*, in the second case, has all the

* See a drawing of it, *supra*, p. 196, Fig. 16.

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material features above specified as contained in Bergen's.* We have no hesitation in saying that both machines are infringements of the appellant's patent.

The next claim to be considered is that of reissue 1038. The appellant describes the nature of the invention sought to be secured by that patent as follows:

"The nature of this part of my invention consists in combining with a seed-planting machine constructed principally of framework, and with not less than two runners and two wheels, a hinged-joint between the point of the tongue and the rear part of the machine (or between what I term its ground supports), so that one part may, by means of said hinge-joint, be raised, lowered, adjusted, or supported on the other part for purposes herein mentioned; meaning by 'one part' and 'the other part' the part in advance and the part in rear of said hinge-joint."

The claim adopts nearly the same language, and is in the following terms:

"What I claim under this patent is, in combination with a seed-planting machine, constructed principally of framework, with not less than two runners and not less than two wheels, a hinged-joint between the point of the tongue and the rear part of the machine, so that one part of the framework may be raised, lowered, adjusted, or supported on the other part, substantially as described."

Understanding this claim as applying and confining to a seed-planting machine, consisting of two separate parts, with runners under one part and rollers or wheels under the other, we do not find in any of the machines produced to us this particular feature of the hinged-joint in combination with the elements referred to. Kirkman's came the nearest to it, if we should designate as a hinged-joint the free connection of his tongue with his machine, which was made by a common bolt between hounds, like those of a wagon. But his machine lacked the elements of the two distinct parts

* See a drawing of Selby's machine, *supra*, p. 197, Fig. 18.

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or frames, which are essential in Brown's, and are implied in the claim of this patent. The hinged-joint as an element in the combination with which it is connected, and of which it forms a part, is useful and valuable. Without it the machine would lack a very material ingredient of its efficiency and usefulness. The device of connecting and combining it with the two integral parts of the machine, and thus connecting and combining those parts so as to produce a useful effect, is one that may be properly denominated invention, although the hinged-joint itself may have existed in other machines which perhaps suggested its use in this. Indeed, the hinged-joint, in one form or another, is an old device. It is exhibited in the reaches of a common wagon, whose fore wheels and hind wheels, in passing over inequalities and obstructions, rise and fall independently of each other. But in the corn-planting machine it has two specific and useful effects, namely, in securing the freedom of the runner from needless disturbance from the rear part of the machine as it pursues its path along the surface, making a furrow of uniform depth, and in enabling the attendant to raise the part containing the runners out of the ground with ease by means of a lever resting on the other part.

The appellees insist that this patent attempts to secure an old device merely applied to a new use, and that the supposed new use is analogous to that which the same device subserved in the machine of Remy & Kelly. But we have seen that the machine of Remy & Kelly was a mere experiment, abandoned by the inventors. And the device in question is not claimed as an original invention, nor as an improvement; it is only patented in combination with other material elements of the machine to which it is attached as a part. As an element in that combination alone is it claimed. The combination expressed in the claim, viewed as an entirety, and in reference to its purposes and uses, is new, and produces a new and useful result. And it is no objection to the validity of a patent for such a combination that some of the elements of which it is composed are not new.

It is objected to several of the patents under consideration

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that they do not state what parts of the machine patented are new and what parts are old, and that they are therefore void. There is nothing in the patent law which, in terms, requires the patentee to do this. The language of the act of 1836, under which these patents were drawn, is that before any inventor shall receive a patent for his invention or discovery he shall deliver a description thereof, and of the manner and process of making, constructing, using, and compounding the same, in such full, clear, and exact terms as to enable a person skilled in the art to reproduce it; and the act directs that the inventor shall "particularly specify and point out the part, improvement, or combination which he claims as his own invention or discovery." This, of course, involves an elimination of what he claims as new from what he admits to be old. But what can be a more explicit declaration of what is new and what is old than the summary of the patentee's claim at the close of the specification, if that is made in clear and distinct terms, or in terms so clear and distinct as to be fairly understood. It implies that all the rest is old, or, if not old, that the applicant does not claim it so far as that patent is concerned. If the patentee by his specification, including the summary claim at its close, points out and distinguishes what he claims as his own invention, it is all that is required. That, if we can find it without difficulty or embarrassment, is what he claims as new; the rest he impliedly, if he does not expressly, disclaims as old. No particular form of words is necessary if the meaning is clear.

These observations apply equally to patents for combinations and patents for improvements. Where a patentee, after describing a machine, claims as his invention a certain combination of elements, or a certain device, or part of the machine, this is an implied declaration, as conclusive, so far as that patent is concerned, as if it were expressed, that the specific combination or thing claimed is the only part which the patentee regards as new. True, he or some other person may have a distinct patent for the portions not covered by this; but that will speak for itself. So far as the patent

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in question is concerned, the remaining parts are old or common and public.

The patents under consideration expressly declare, for the most part, what the patentee claims; generally referring, it is true, to the specification as embodying the substantial form of the invention. Such a reference is proper if it does not introduce confusion and uncertainty, and is often necessary for restraining the too great generality, or enlarging the literal narrowness of the claim.

These remarks apply to reissue 1088, which we are now considering. We regard it as sufficiently explicit; and we think the patent is valid.

The next inquiry is whether this patent is infringed by the appellees. It is apparent on inspection of the models before referred to that they exhibit every requirement of the patent. They clearly have, "in combination with a seed-planting machine, constructed principally of framework," and consisting of two separate parts, with two runners under one part and two wheels under the other, a hinged-joint between the point of the tongue and the rear of the machine, so that one part of the framework may be raised, lowered, adjusted, or supported on the other part, substantially as described in Brown's specification. In Selby's machine, it is true, the hinge-joint is not located at the same point (the seed-boxes) as in Brown's machine, but is at the front point or toe of the runner. This is not a substantial difference. The office, purpose, operation, and effect are the same as in Brown's machine, and a change a little more or less backward or forward does not change the substantial identity of the thing. The same remark applies to the location of the hinge-joint in Bergen's machine, which is at the rear part of the front frame.

We do not see how it can be seriously contended that either of the machines is not an infringement of this patent.

Reissue 1089 contains two claims, as follows:

"What I claim under this patent is a seed-planting machine, wherein the seed-dropping mechanism is operated by hand or

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by an attendant, in contradistinction from 'mechanical dropping,' the mounting of said attendant upon the machine, in such a position that he may readily see the previously made marks upon the ground, and operate the dropping mechanism to conform thereto, substantially as herein set forth.

"I also claim, in combination with a seed-planting machine, composed substantially of framework, and upon which the person who works the seed-slides or valves sits or stands, a lever or its equivalent, by which a driver or second attendant may raise or lower that part of the framework that carries the attendant and the seeding devices, and thus ease the machine in passing over intervening obstacles or in turning around, substantially as described."

The first of these claims, if construed simply as claiming the placing of the seed-dropper on the machine, would probably be void, as claiming a mere result, irrespective of the means by which it is accomplished. But if construed as claiming the accomplishment of the result by substantially the means described in the specification, it is free from that objection; and we ought to give a favorable construction, so as to sustain the patent if it can fairly be done. By reading the claim in connection with the final qualifying clause, thus, "the mounting of said attendant upon the machine, &c., substantially as herein set forth," the fair construction would seem to include the means and manner of placing him upon the machine. This view is corroborated by reference to the body of the specification. "To enable others skilled in the art," says the patentee, "to make and use this invention, I will proceed to describe the same, with reference to the drawings." He then gives a detailed description of the seat or platform and its relation to the other parts, and the mode of occupying and using the same. Construing the claim in this manner, is it then a valid claim?

The only device of a similar character at all competing with it in the matter of time, was that used by Joab Brown, in his machines constructed or altered in the spring of 1851, the same spring in which the appellant's machine was made. Which was first made, it is impossible for us from the evi-

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dence to tell. Joab Brown, as well as the applicant, applied for a patent for one of his machines having the arrangement of a seat for the dropper. A patent was granted to the appellant, and none was granted to Joab Brown. The Patent Office subsequently amended the appellant's patent so as to include a claim for this very thing in question. Under these circumstances, in the absence of conclusive evidence to the contrary, the presumption is in favor of the appellant. The burden of proof is on the party who sets up the objection of "prior use" against the patent.

The second claim is for a combination, embracing, as one of its elements, the arrangement or seat for the dropper last described; and if that was new, this combination must also be new. And, indeed, we shall look in vain in any previous machine for the lever here described in the combination with which it is associated. Standing by itself, the lever as well as the hinged-joint was exhibited in the experimental machine of Remy & Kelly. But as, in our view, that machine was never brought into successful operation until after Brown's invention was completed, we do not regard the fact referred to as seriously affecting the question. The particular combination described by the patent under consideration is new, and the claim is valid.

This is the proper place, however, to notice an objection made against the three patents conjointly, namely: reissues 1036, 1038, and 1039. It is contended that they are for substantially the same combination. We do not think that this is the fact. We regard the reissue 1036 as a patent for the corn-planting machine in outline, comprising its most essential elements, namely: constructed principally of frame-work "substantially as and for the purpose set forth" in the specification; containing the two frames or parts, loosely or freely connected; one supported by the runners, the other by the wheels following them, each having its distinct purpose as indicated; and the seeding apparatus being arranged for planting in check-rows, whether automatically or by hand, the method of each being shown in the specification. This patent does not call for a hinged-joint with its particular

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appliances, or for a particular arrangement of seat or location for the dropper. Reissue 1038 is for a different combination, including the separate parts or frames, the runners, the wheels, and lastly the hinged-joint so arranged that one part of the framework may be raised and lowered on the other part. Reissue 1039 claims, first, a seat or platform for the dropper, on the machine, so that he may watch the cross-rows and plant by them; secondly, in addition thereto, the particular device of the lever, by which the driver may raise or lower the framework that carries the dropper.

This view of the relative objects of the three patents, as we think, shows that they are not obnoxious to the objection raised.

Having already examined the question of infringement as it respects reissues 1036 and 1038, it remains to inquire whether the appellants have infringed reissue 1039. Of this there can be no doubt. In both of their machines the dropper is mounted on the machine on a seat or platform arranged for that purpose, so as to observe the cross-rows, and drop by them; and in both, levers are used (not precisely in the form of Brown's, but equivalent thereto, and substantially the same), by which the driver may raise or lower that part of the framework that carries the dropper and the seeding devices. In Bergen's machine, this lever is the rear frame itself, which is hinged to the rear part of the seeding-frame, and is operated by the driver by tilting it back and forward by his own weight.

It is unnecessary to examine reissue 1040, as there is no pretence that the appellees have infringed that patent.

The second group of reissues is next to be considered.

The first, No. 1091, after describing the entire machine as finally perfected by Brown, prior to the issue of his second patent, May 8th, 1855, has the following claims:

"First. In combination with a seed-planting machine that is operated by hand, the placing of both the driver and the person who operates the seed-slides or valves, upon the machine, in such position as that each may attend to his particular duty

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without interfering with that of the other, substantially as described.

"I also claim, in combination with a seed-planting machine, that is operated by hand, and upon which the driver and the person who works the seed-slides or valves sit or stand, the so locating of said seats or stands, as that the weight of one of the persons may be used to counterbalance or overbalance the weight of the other, for the purpose of more readily raising or lowering the seeding apparatus, substantially as and for the purpose described."

These claims are analogous to those of reissue 1039, and the first is anticipated by the machines of Joab Brown, constructed and altered in the spring of 1851. It is not pretended that the appellant placed both attendants on his machines until the spring of 1853, when he placed the driver's seat, as well as the dropper's, on the twelve machines which he manufactured and sold at that time.

The second claim is for the relative location of the seats for the driver and operator, such that one of them may overbalance the weight of the other, and thus more readily raise or lower the seeding apparatus. The claim is made only in reference to machines operated by hand, on which both driver and operator sit or stand. The seats themselves can be of little consequence in this combination. The relative location of the attendants is the material thing.

The process of tilting the frame of a seed-planter on the wheels as a fulcrum, by shifting the weight of the driver standing or sitting thereon, was exhibited in Kirkman's machine, in the spring of 1852, and in Farley's model, made in January, and publicly deposited in the Patent Office in February, 1853.

The appellant does not fix the date of his alleged improvement earlier than the 20th of April, 1853, it being first introduced into the twelve machines built in that year. He was anticipated, therefore, by Kirkman and Farley, so far as their machines were identical with his. They do not come within the literal terms of his claim which refers the improvement only to machines operated by hand, and on which the oper-

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ator is carried. Kirkman and Farley had no operator, and, of course, had none on their machines. Was this difference material? The device was not altered by Brown substantially, in form, operation, or purpose. The only difference was the presence of the dropper on the machine, making a greater weight to be raised than existed before, and applying it to a check-row corn-planter. It seems to us that it was simply the application of an old device to a new use.

We are of opinion, therefore, that reissue 1091 is void.

The claim of reissue 1092 is as follows:

"What I claim under this patent is: In combination with a seed-planting machine, operated by hand, and having its seeding devices forward of the centre of the wheels, and forward of the driver's seat and a hinged connection, the locating of the seat in such relation to a line drawn through the centres of the wheels or ground-supports, as that the occupant of said seat may, by moving himself, or throwing his weight forward or backward on his seat, without the necessity of rising, walking, or standing over or near the seeding devices, force the seeding apparatus into, or raise it from, the ground, substantially as described."

After a careful consideration of this claim, we are brought to the conclusion that the subject of it is not patentable. Prior inventions having placed the driver on the machine, and having constructed the platform in such manner that his movement backward or forward would raise or lower the seeding apparatus, and the seat itself not being claimed as new, it can hardly be contended that the proper location of the seat for effecting the same object, required the exercise of inventive power.

The next patent, reissue 1093, after describing the machine as before, with its runners and front frame, its wheels and rear frame, its seat for the driver over the wheels, and contrivance for raising and lowering the front frame, its seat for the dropper over the runners, its hinged-joint, &c., concludes as follows:

"There are two points in this machine that have unvarying positions or heights with regard to the ground, viz.: the point

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of the tongue, as its height is defined by horses' necks, to which it is attached, and they standing of course upon the ground, and the journals or axle of the covering or supporting wheels F F, as they roll on the ground, and between these fixed points, the hinged connection between the front and rear part of the machine, is made so as to admit of raising or lowering the seeding devices.

"Having thus fully described the nature and object of this part of my invention, what I claim under this patent is, in combination with a seed-planting machine that has a hinged or yielding joint between its fixed points of support, and with its seeding devices between said points, the so connecting of the parts between said fixed points of support as that that portion of the machine carrying the seeding devices may be raised up out of the ground by the attendant riding on the machine, and be carried by the tongue or horses' necks, and the supporting wheels, substantially as and for the purpose described."

The precise thing claimed here, after defining the combination of which it is to form a part, is, "*the so connecting of the parts*" as to produce the result mentioned, "*substantially as and for the purpose described.*" If this means to include *any* and *every* connection of the parts which will produce the result "substantially as described" (which result is to enable the attendant, riding on the machine, to raise that portion of the machine carrying the seeding devices out of the ground so as to be carried on the horses' necks and the wheels), then the claim was anticipated by Kirkman, for the connection of the parts in his machine enabled the attendant, riding on the machine, to raise the front part which carries the seeding apparatus, out of the ground, when it would be suspended on the horses' necks and the wheels; and he had a hinged joint between the fixed points of support. The same might be said of the machine of Remy & Kelly, if it were to be taken into consideration in determining this question. But if the claim is to be construed as limited to the mode of connecting the parts in the appellant's machine (being a hinged connection between the two frames, and, therefore, different from Kirkman's machine), and to the means by which the final result was accomplished, namely, by the

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shifting of the driver's weight on the machine (and, therefore, different from Remy & Kelly's), then this objection would be obviated. But thus modified, it would substantially correspond with reissue 1038, being simply for a mode of doing that, with the driver on the machine, which was done before, under 1038, with the driver on the ground, employing only in addition the mode of operation used by Kirkman. In other respects the two combinations would be precisely the same.

We are of opinion, therefore, that this patent cannot be sustained.

The next patent, reissue 1094, is for a matter too frivolous to form the subject of invention. It is simply for a peg or stop to prevent the rear part of the machine from tipping so much as to dump the driver on to the ground. No mechanic of any skill would construct a machine of the character described without providing some such arrangement. This patent is not sustained.

The latest patent of the series, reissue 1095, is for a peculiar valve in the tube through which the seed is dropped to the ground, called the flipper valve. When the machine is in motion, the time taken for the seed to drop from the hopper to the ground, supposing it to drop from a height of only 18 or 20 inches, would carry it forward more than a foot after its discharge, and thus carry it beyond the cross-row. It became important, therefore, to drop the seed from a point near the ground, or from the bottom of the tube instead of the hopper, at each movement of the lever by the operator. To do this required two movements; one for dropping the seed from the hopper into the tube; the other for dropping it from thence to the ground. By the device described in this patent, which was noticed at the commencement of this opinion, both of these movements of the seed take place at the same instant and by one movement of the hand; the seed for one hill being dropped into the ground at the same time that the seed for the next hill is dropped into the tube.

The claim of the patent is in the following words:

"Having thus fully described my invention, what I claim

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under this patent, is so combining with a lever, by which both may be operated, a valve or slide in the seed-hopper and a valve in the seed-tube, as that a half motion of the lever by the operator riding on the machine, by which they are operated, shall both open and close the seed passages at regular periods, and pass measured quantities only, substantially as described."

As before stated, the mode by which this was effected was by placing in the seed-tube a long slender valve composed of a slip of metal, suspended on a pivot in the middle, so that when one end was pushed forward the other end would be pushed backward. In this way each movement of the upper extremity would let a charge of seed into the tube on one side and keep it there, whilst the simultaneous movement of the lower extremity would discharge the previous charge on the other side.

The appellees endeavored to show that this apparatus was anticipated by the inventions of Charles Finn and Jarvis Case, before mentioned.* Finn says that he invented his machine in the summer or fall of 1851. The seed-dropping apparatus consisted of a vibrating side or back to the seed-tube, which required two movements, one backward and the other forward, for dropping each hill of corn, alternately opening and closing the tube. It was operated by levers in connection with the valves in the hoppers. But each hill or check-row required one movement of the lever to let the seed into the tube, and a reverse movement to let it out. And this double movement was repeated at every check-row. Whereas, by Brown's apparatus both results were accomplished by a single movement; a forward movement effecting a dropping for one check-row and a backward movement effecting it for the next. It is evident that although there was a similarity between the two processes they were essentially different. It may be that Brown's is only an improvement on the process used by Finn. If this be so, still it is only the improvement (that is, the machine as he uses it) that he claims by his patent.

* See drawings of these, *supra*, p. 200, Figs. 23, 24, 25, and 26.

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The machine of Case, which he swears he constructed in March, 1853, is still more unlike Brown's in form, though less unlike in operation. It has two independent valves, one in the hopper to let the seed into the tube, and one at the bottom of the tube to let it out. These two valves are so connected by a chain or string that both are opened at once. A spring is arranged to shut them as soon as possible, so as to prevent the seed admitted above from escaping below until the next movement of the lever. This apparatus, it is true, requires but one movement of the hand for each dropping, the spring performing the other. But the spring has to be drawn by the force of the hand so as to have the necessary recoil. The same strength has to be exerted by the operator as if he made both movements with his hand. It is evident that this device is also different from the appellant's. The two have similarities, but they are essentially distinct machines.

But it is insisted that Brown, in 1860, admitted in a newspaper article that the process in question was old. We have examined the article, and, according to our construction, his declaration amounted in substance to nothing more than that the principle of the double drop was old (which was probably true), and that Case's application of it was old (which may or may not be true); but it does not contain, or amount to, an admission that his own peculiar process was old.

We think, therefore, that this patent must be sustained.

The last patent is clearly infringed by the Selby machine. The flipper valve and mode of operating it are almost precisely the same.

In the case of the Bergen machine, it is contended that no lever is used for moving the connecting rod backward and forward between the hoppers. A fixed perpendicular handle is used instead of a lever. The question is, whether that is such an alteration as to change the character of the combination. The object in view is to put into the hand of the operator something by which he can move the connecting rod, and consequently open the valves, the instant he

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comes to the cross-row. It is of no consequence in the world whether the cross-bar moves in the same direction with his hand or in the reverse direction. A lever working on a pivot or fulcrum between the hand and the connecting rod would cause the latter to move in the reverse direction to that of the hand; a lever working on a pivot or fulcrum below or beyond the connecting rod, would cause the latter to move with the hand; so would a lever or handle firmly fixed to the rod. The claim is for "a lever or its equivalent," in combination with other things. Whilst in most cases a mere handle is not the equivalent of a lever, because not capable of performing the same functions, in this case it is an equivalent, because it does perform precisely the same function in substantially the same way.

In our judgment both machines are an infringement of the patent.

We have thus, with perhaps unnecessary detail, gone over and considered the various questions and points raised in these cases. The result is, that the reissued patents, numbered respectively 1036, 1038, and 1039, of the first series, and 1095, of the second series, are sustained as good and valid patents, and that the appellees are infringing the same.

DECREES REVERSED, and the causes REMANDED, to be proceeded in

ACCORDING TO LAW.

Mr. Justice CLIFFORD, with whom concurred Justices MILLER and DAVIS, dissenting.

Applicants for a patent are required to file in the Patent Office a written description of their invention and of the manner and process of making, constructing, and using the same, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, and use the same; and in the case of a machine he must explain the principle thereof and the best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions. Patents granted with-

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out a compliance with those conditions are invalid, as the express requirement of the act of Congress is that every inventor or discoverer shall do so, *before* he shall receive a patent for his invention or discovery.*

Letters-patent were granted to the complainant on the second of August, 1853, to take effect from the second of February prior to the date of the patent. Seed-planter is the name of the invention given in the patent, but in the introductory part of the specification it is denominated "new and useful improvements in seed-planters for planting corn and smaller grains." Very minute description is given of the machine and of the several devices of which the machine is composed, for the declared purpose of enabling others skilled in the art to make and use the invention. Suffice it to say, without entering into details, that of all the numerous devices described as ingredients of the machine not one of them is new, nor is it claimed that the patentee either invented the machine or any one of the ingredients of which it is composed. What he claims in that patent is as follows: (1.) The oscillating horizontal wheels or distributors in the bottom of the hopper, having slots and tubes of various sizes, *in combination* with the stationary caps and pins for the discharge of different kinds and qualities of seeds. (2.) He also claims the arrangement of the covering rollers, mounted as described, and performing the functions of covering the seed, elevating the cutters in turning the machine, and also in adjusting the cutters to different depths.

Tested by the descriptive portion of the specification the better opinion is that the second claim is also for a combination, but in the view taken of the case it is unimportant whether it be regarded as a method of accomplishing the described result or as a combination of the described ingredients to effect the same end, as it is quite clear that the patentee does not claim that he is the original and first inventor of any one of the several devices of which the entire machine is composed. Beyond all doubt the invention con-

* 16 Stat. at Large, 201.

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sisted of the two combinations described in the respective claims, and it is equally certain that the letters-patent were in all respects sufficient to secure the full enjoyment of the patented machine to the patentee. Nevertheless the patentee surrendered the same, and on the sixteenth of February, 1858, the same was reissued to him with amended specification which contains only one claim. Instead of claiming a combination of old ingredients, as in the original patent, he claimed in the reissued patent a shoe for opening a furrow, which has a convex edge in front and a seeding-tube in its rear end, so that it may cut through any grass, open out a furrow, and hold it open until the seeds are deposited in the same, substantially as set forth in the specification.

Like the original patent the reissued patent was in form both operative and valid, but inasmuch as it was not sufficiently comprehensive to supersede all other improvements the patentee surrendered it for a second time and caused the original invention to be reissued in five parts, embracing several claims, all of which except one are involved in the present action.

Surrendered patents cease to be a cause of action from the moment the surrender takes place, nor can the owner of the patent recover, even for an infringement which preceded the surrender, unless the claim for profits or damages had passed into judgment before the surrender took place. Such a patent, though inoperative as a cause of action, may be admitted as evidence to support or disprove an issue that the reissued patent is not for the same invention as the original. Reference may also be made to such patent, as to a repealed statute, to aid in the construction of a reissued patent, if the latter is ambiguous, but it ceases to be operative for any other purpose just as much so as a repealed statute, and can never have the effect to enlarge or diminish the operative words of a reissued patent.

Patents are public grants, and every person claiming any right under such an instrument must show that the right claimed is secured by the instrument; nor can he be benefited by showing that the right claimed was secured by a

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surrendered patent, unless the reissued patent also secures the same.

Viewed in the light of these suggestions it is clear that the rights of the complainant in this case depend solely upon the last-mentioned reissued patents, which are the patents mentioned in the bill of complaint, and which it is alleged by the complainant that the respondents have infringed.

Defences of various kinds are set up by the respondents to the allegations of the bill of complaint, as follows: (1.) That the complainant is not the original and first inventor of the improvements described in the said several patents mentioned in the bill of complaint. (2.) They deny that the said new patents were issued in good faith, and they allege that said reissued patents are not for the same invention as that described and embodied either in the original patent or in the prior reissues of the original patent. (3.) That the five last-mentioned reissued letters-patent are severally invalid in law and void and of no effect, and that they do not confer any such right or monopoly to the complainant as he alleges and pretends to claim.

Enough has already been remarked to show that the original patent was a combination of old ingredients by which the described result was effected; or, in other words, that the patented invention consisted in a new combination of the described ingredients, every one of which was proved to be old. Old ingredients are not the proper subjects of letters-patent in any other form than as a combination, for the plain reason that nothing is the proper subject of a patent which is not both new and useful.

Reissued patents must be for the same invention as the original, and that condition is just as applicable to a second reissue as to the first; nor is the second reissue relieved in any respect from the full force of that condition in a case where the invention in the reissue is divided into several parts.

Undoubtedly a new and useful combination consisting of old ingredients may be the proper subject of letters-patent if the combination produces a new and useful result, but the

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act of Congress does not authorize the patentee to surrender such a patent and to reissue the same for the separate ingredients, for the plain reason that the ingredients are old, and for the additional reason that a patent for a separate ingredient is not the same as the combination of several ingredients.*

Authorities to support these propositions are unnecessary as they are self-evident, nor is it necessary to do more than to refer to the several claims of the several reissues under consideration to show that every one of those reissues are invalid, both for the reason that the alleged improvement is old, and also for the reason that the invention embodied in each of the reissued patents is different from the one secured by the original patent. Even the court here admits that each one of those reissues is "for a distinct and separate part of the original invention alleged to have been made by the complainant," full proof of which is exhibited in the claims of the respective reissued patents.† They are as follows:

1. No. 1036.—Appended to that patent is a claim much more comprehensive than is to be found in either of the four other patents, but it is plainly not a claim for a combination, nor one for the whole machine, as was admitted in argument by the complainant. What he there claims is a seed-planting machine constructed principally of framework, the front part of which is supported on not less than two runners, or shoes, with upward inclining edges, and the rear part is supported on not less than two wheels, the latter being arranged to follow the former.

Evidently that claim is not intended to cover the whole machine; nor would it benefit the complainant even if it could receive that construction, as it is not pretended that he was the original and first inventor of such a planting machine, nor that the specification of the original patent professed to describe such an original invention. Machines of the kind have existed for a very long period before the

* Gould v. Rees, 15 Wallace, 194. † Gill v. Wells, 22 Id. 1.

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date of the complainant's patent, even for a period whereof the memory of man runneth not to the contrary.

2. No. 1037.—Nothing is claimed in this patent except the construction of a shoe or runner for a seed-planting machine, with an upward inclining edge, with its point sufficiently raised so that it will climb up and over, or cut and break through intervening obstacles without materially forcing the earth laterally at its front part, and widening towards the rear end so as to open a furrow in which the seed to be planted may be deposited, and long enough to furnish a support to the framework of the machine. Explanations of that patent are certainly unnecessary, as it is plain that the claim is for distinct and separate ingredients of the combination embodied in the original patent.

3. No. 1038.—Under this patent the complainant claims a hinged joint between the point of the tongue and the rear part of the machine in combination with a seed-planting machine, so that one part of the framework may be raised, lowered, adjusted, and supported on the other part. Nor is any argument necessary to show that the claim of the patent is for one of the separate and distinct ingredients of the combination embodied in the original patent, all of which were confessedly old.

4. No. 1039.—Two claims are made in this patent as follows: (1.) The seat for the attendant, or, in the language of the claim, the mounting of the attendant upon the machine or seed-planter, wherein the seed-dropping mechanism is operated by hand, in such a position that he may readily see the previously made marks upon the ground, and operate the dropping mechanism to conform thereto. (2.) He also claims a lever, in combination with a seed-planting machine, or its equivalent, by which the driver or second attendant may raise or lower that part of the framework that carries the attendant and the seeding devices.

Manifestly the lever or its equivalent is the principal subject-matter of that claim, reference being made to certain other parts of the seed-planter merely as a means of describing the functions to be performed by the lever, and the

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results to be attained by its use; nor does it require any argument to show that the lever is old, as it is matter of common knowledge that it was well known long before the original patent of the complainant was issued.

5. No. 1040.—Two claims are also made by the patentee in this patent: (1.) He claims a pair of auxiliary wheels and an axle, in combination with the seed-planting machine, carried mainly upon not less than two runners and two covering-wheels, for the double purpose of taking a portion of the weight off from the runners and the other wheels, and for affording means of readily converting the machine from a hand-planter to an automatic seed-sower. (2.) He also claims hanging the axle of the auxiliary wheels on hinged or adjustable arms or levers, so that more or less of the machine may be placed upon the auxiliary wheels.

All necessity for any remarks upon those claims is superseded by the admission that they are not infringed by the respondents.

Four of the five reissues are included in the charge, and the complainant also charges that the respondents have infringed five other reissued patents held by him, which also secure to him the exclusive right to the respective improvements therein described, all of which appertain to the same machine for planting corn and smaller grains.

Reference will first be made to the original patent from which those several reissues are derived. Like the preceding reissued patents, these were all derived from a single original patent, issued May 8th, 1855, as appears by the record, which it is claimed is an improvement upon the prior original patent.

Doubtless the patentee made some change in the original machine, as appears by the descriptive portion of the specification; as for example, he enlarged the rollers, increased the length of the side pieces, connected those pieces by cross pieces, and constructed the frame in two parts, denominated front and rear, placing the long seat for the driver on the front end, in order that he may slide forward or back, to tilt the machinery when necessary to deepen the furrow, or

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to raise the front of the shoes from the ground, as occasion calls for such a movement; but he invented no new ingredient or device, nor did he introduce any element into the machine which was not previously well known, all of which will sufficiently appear from the claim when compared with the drawings, without reproducing the details of the specification annexed to the patent. It contains but a single specification in that regard, which, in substance and effect, is as follows: What he claims is the runners, with their valves, in combination with the hoppers and their plates, together with the adjustment of the valves by means of levers and cams, and the driver's weight, for the purpose of carrying and dropping seeds by each vibration of the lever, and to regulate the depth of the planting.

Tested by the description contained in the specification it is not doubted that the patent was a valid one for the described combination, which, beyond all doubt, is composed of all ingredients. Regarded as an invention for a combination it may be regarded as an improvement upon the original invention described in the first-mentioned patent, but it is quite clear that it contains no devices except such as had long before been well known to mechanics.

Though operative and valid still it was not satisfactory to the complainant, because not sufficiently effective to shut out other improvements for planting seeds. Accordingly, on the tenth of November, 1857, he surrendered the patent and the same was, on the same day, reissued to him with a single claim, as follows: He claims the locating the seat for the driver in the rear of the supporting axle in combination with the hinged frames or hinged joint, so that as the driver moves forward or back, on his seat, the rear frame may act as a lever for lowering or raising the seed part of the machine, and thus throw it into or out of the ground, as circumstances may require.

Probably it would be difficult to frame a claim which would more exactly embody the true nature of the actual improvement, but still it was not satisfactory to the complainant, and on the eleventh of December, 1860, he sur

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rendered the patent, and the same was reissued to him in five separate patents, as follows:

1. No. 1091.—Two claims are contained in this patent as follows: (1.) The placing of both the driver and the person who operates the seed-slides or valves, in such a position on the seed-planter that each may attend to his particular duty without interfering with that of the other. (2.) The so locating the seats or stands for those persons, in combination with the machine, that the weight of one of the persons may be used to counterbalance or overbalance the weight of the other, for the purpose of more readily raising or lowering the seeding apparatus.

2. No. 1092.—He claims in this patent the locating of the seat in the machine in such relation to a line drawn through the centre of the wheels or ground supports that the occupant of the seat may, by moving himself or throwing his weight forward or backward on his seat, without the necessity of rising, walking, or standing over or near the seeding devices, force the seeding apparatus into or raise it from the ground.

3. No. 1093.—His claim in this patent is the so connecting of the parts between the fixed points in the described machine that the portion of it carrying the seeding devices may be raised up out of the ground by the attendant riding on the machine and be carried by the tongue or horses' necks and the supporting wheels.

4. No. 1094.—Where he claims a lock-block or stop, in combination with the machine, which prevents the rear part of the frame from descending so low as to strike the ground or inconvenience the occupant of the seat upon the rear portion of the frame.

5. No. 1095.—His claim in this patent is for a valve or slide in the seed-hopper and a valve in the seed-tube, so combining with a lever operating both that a half-motion of the lever by the operator riding on the machine, shall open and close the seed-passages at regular periods and pass only the right quantities.

Most of these ten reissued patents are for a single ingre-

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dient of the combinations described in the two original patents, and every one of the others is for a separate and distinct part of one or the other of those combinations; and the rule of decision set up by the complainant is that he may mass these several patents just as if the several ingredients were all described in one patent embracing a claim for a combination of each and every of the respective ingredients included in these ten several patents. Such a theory, in my judgment, is simply absurd, and it is certain that it finds no support in any decided case nor in any treatise upon the rules and practice in patent cases.

Argument to show that such is the theory of the present suit is scarcely necessary, as it is plainly shown in that part of the bill of complaint which alleges that the improvements and inventions contained in those several letters-patent constitute separate parts of an entire machine for seed-planting, and that they may be constructed for use and used in one machine in that department of agriculture; and the complainant charges that the respondents have constructed machines and used the same and vended the machines to others to be used in imitation of all those improvements and inventions except the improvement described in the reissued patent No. 1040, which it is admitted is not infringed by the respondents.

All the ingredients described in those ten reissued patents are old, and it was admitted at the argument that no one of the patents contains a claim for a combination of the several ingredients described in the said several reissued patents, and that the case rests on the basis that the several claims or some of them are valid though not amounting to a combination.

Valid patents may be granted for a new combination of old ingredients, provided it appears that the new combination produces a new and useful result, but the invention in such a case consists entirely in the new combination, and any other party may, if he can, make a substantially different combination of the same ingredients, or he may use any number of the ingredients less than the whole, for the reason

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that the monopoly of the patent extends only to the combination and not to the ingredients separately considered.*

Patents may also be granted for a machine or for a separate and distinct device, but it cannot be held that such a patent is valid unless it be proved that the patentee is the original and first inventor of the thing patented.†

None of the separate devices patented in those reissued patents are new, and it being conceded that no one of the patents contains any such a combination as that embodied in either of the original patents, it is clear in my judgment that the decree of the Circuit Court should be affirmed, unless the theory that these several patents can be massed and be by judicial construction converted from patents for separate and distinct ingredients into one patent for a combination of all the ingredients described in the several patents mentioned in the bill of complaint.

Courts of justice cannot accomplish such an object by construction nor in any other mode, for several reasons: (1.) Because the province of construction is restricted to the ascertainment of the meaning of the language employed in the grant. (2.) Because the object can only be accomplished by the surrender of these patents and by a reissue of the original patent, which is a matter within the exclusive jurisdiction of the commissioner. (3.) Because each of these patents is a separate and distinct grant. (4.) Because the court in construing such a grant is restricted to the language employed by the granting power. (5.) Because several patents for several separate and distinct devices do not in law amount to a patent for a combination, and, therefore, cannot so be declared by a court of justice.

The CHIEF JUSTICE took no part in the judgment given in this case; the argument having been had before he was appointed. The case was held long under advisement, and the opinions were not given to the Reporter until long after the judgment was rendered.

* Vance v. Campbell, 1 Black, 428; Prouty v. Ruggles, 16 Peters, 341.

† Seymour v. Osborne, 11 Wallace, 355.

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THE COLLECTOR v. RICHARDS.

The act of May 22d, 1846, enacting that "in all computations at the custom-house, the franc of France . . . shall be estimated at eighteen cents and six mills," is repealed by the act of March 3d, 1873, "to establish the custom-house value of the sovereign or pound sterling of Great Britain, and to fix the par of exchange," the first section of which act enacts:

"SECTION 1. That the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin or standard value, and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the Director of the Mint, and proclaimed on the 1st day of January by the Secretary of the Treasury."

"SECTION 3. That all acts and parts of acts inconsistent with these provisions be, and the same are hereby, repealed."

Held, accordingly, that the Director of the Mint having estimated the value of the franc of France at nineteen cents and three mills, and the Secretary of the Treasury having on the 1st of January, 1864, proclaimed it as of that value accordingly, goods invoiced in French francs and entered in a custom-house here in March of that year, were to be charged at the new valuation of the franc.

ERROR to the Circuit Court for the Southern District of New York.

Richards sued Arthur, collector of the port of New York, at law in the court below, to recover an alleged excess of duties on imported goods exacted by the defendant and paid by the plaintiff under protest. Judgment was given in favor of the plaintiff, and to reverse this judgment this writ of error was brought.

The case was thus:

On the 16th day of March, 1874, the plaintiff, Richards, entered at the custom-house an invoice of all-wool dress-goods imported from France, the value of which was invoiced in francs of the currency of France. By an act of Congress passed May 22d, 1846,* it was enacted that "in all computations at the custom-house, the franc of France . . . *shall* be estimated at eighteen cents six mills." At this rate of estimation of the French franc in money of account

* 9 Stat. at Large, p. 14, § 1.

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of the United States, the dutiable value of these goods was less than twenty cents per square yard, and under the then existing tariff, subject to an *ad valorem* duty of thirty-five per cent., and an additional duty of six cents per square yard. The plaintiff contended that this act of May 22d, 1846, fixed the value of the franc, and accordingly that he was chargeable only at the rate of eighteen cents six mills for each franc.

On the other hand the defendant relied on the act passed March 3d, 1873, entitled "An act to establish the *custom-house value of the sovereign or pound sterling of Great Britain*, and to fix the par of exchange;"* by which it was enacted as follows:

"SECTION 1. That the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value, and the values of the standard coins in circulation of the various nations of the world shall be estimated annually by the Director of the Mint, and proclaimed on the 1st day of January by the Secretary of the Treasury.

"SECTION 2. That in all payments by or to the treasury, whether made here or in foreign countries, when it becomes necessary to compute the value of the sovereign or pound sterling, it shall be deemed equal to $4.86 and 6½ mills, and the same rule shall be applied in appraising merchandise imported, when the value is by the invoice in sovereigns or pounds sterling, and in the construction of contracts payable in sovereigns or pounds sterling; and this valuation shall be the par of exchange between Great Britain and the United States; and all contracts made after the 1st day of January, 1874, based on an assumed par of exchange with Great Britain, of fifty-four pence to the dollar, or $4.44⅘ to the sovereign or pound sterling, shall be null and void.

"SECTION 3. That *all acts and parts of acts inconsistent with these provisions be, and the same are hereby, repealed.*"

Under this act the superintendent of the mint prepared two tables, one showing the standard value of foreign coins

* 17 Stat. at Large, 602.

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and moneys of account, according to the amount of pure metal contained therein, as provided in the first clause of the first section; and the other, showing the weight, fineness, and value of certain foreign coins in actual circulation, as assayed at the mint, exhibiting a slight diminution of the values contained in the first table. The Secretary of the Treasury, by a circular letter addressed to the collectors of the customs, declared that the values contained in the first of these tables would be used in the computation of customs duties from and after the 1st of January, 1874. This made the value of the franc nineteen cents and three mills, which carried the dutiable value of the plaintiffs' goods above twenty cents per square yard, and subjected them, in consequence, to an *ad valorem* duty of forty per cent., and an additional duty of eight cents per square yard. The collector required the plaintiff to pay duties in accordance with the latter valuation. This he did under protest, and now brought, as already said, this suit to get back the value.

The question thus was whether the effect of the first and third sections of the above-quoted act of 1873 was to repeal the act of 1846, and to substitute in all computations at the custom-house for the valuation of foreign coins, which had been previously prescribed by statute, the valuation according to standard value, annually estimated by the Director of the Mint and proclaimed by the Secretary of the Treasury.

It was asserted by the importer in the argument and not denied by the government, that the effect of the construction sought to be established by the government, would be materially to increase the amount of duties imposed by the *ad valorem* tariff, where the rate was upon a sliding scale in proportion to the value of the article. The duty was raised upon one class of articles eighteen per cent.; upon another class twenty-five per cent.; upon other classes still more highly; and the aggregate result would be to increase the amount of duties annually millions of dollars.

The opinion of the court below was that the first section of the act of March 3d, 1873, and the act of May 22d, 1846, did not cover the same subject; and that the latter act was

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not repealed; and accordingly that in fixing the *dutiable* value of the goods under consideration, the old value of $18\frac{6}{10}$ cents fixed by the act of 1846 should have been given to the franc, and not the new value of nineteen cents and three mills given to it by the act of 1873.

The document presents so curious and interesting a history, and the facts which it collates show how much more difficult than from the language of the two statutes alone, might be imagined, was the question to be solved by this court, that the Reporter deems it worthy of preservation in this place.

The court below said:

"It is apparent, from an examination of the second section of the act of 1873, that the intention of Congress was to make a complete change for all commercial purposes in the valuation of the *pound sterling*. In addition to the provision 'that in all payments by or to the treasury, whether made here or in foreign countries,' the value of the sovereign shall be deemed equal to $4.86 and 6½ mills; it is also expressly declared that 'the same rule shall be applied in appraising merchandise imported when the value is, by the invoice, in sovereigns or pounds sterling. Apt, appropriate, and definite language was here used to declare the radical change effected by the section and indicated by the title of the bill. 'The position of the defendant is, that the same change is wrought, in regard to the value of all other foreign coins of the various nations of the world, by the general provision of the first section—'the value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value.'

"It was not denied upon the trial that the effect of this construction of the first section would be to materially increase the amount of duties imposed by the *ad valorem* tariff, where the rate is upon a sliding scale in proportion to the value of the article. Such a change, in regard to the pound sterling, was unmistakably intended and made by the second section of the act in question. If the same purpose existed in regard to other coins, why was not the intent expressed in similar decisive terms? The entirely different phraseology of the two sections of the act suggests the conclusion that the object of each section was not the same.

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"In considering the question more closely, it is apparent that if the act of May 22d, 1846, and the other statutes which provide for the valuation of foreign coins in custom-house computations are repealed by the first and third sections of the act of March 3d, 1873, such repeal is by implication only.

"The rule in regard to repeals by implication is laid down in *United States* v. *Tynen*,* as follows: 'It is a familiar doctrine that repeals by implication are not favored. When there are two acts on the same subject, the rule is to give effect to both, *if possible*. But if the two are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first, and even where two acts are not in express terms repugnant, yet, if the latter covers the whole subject of the first, and embraces new provisions plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act.' And in *Henderson's Tobacco*,† Mr. Justice Strong, in reasserting the rule, adds: 'It must be observed that the doctrine asserts no more than that the former statute is repealed so far as the provisions of the subsequent statute are repugnant to it, or so far as the latter statute, making new provisions, is plainly intended as a substitute for it.'

"In order, then, to ascertain whether the act of 1873 is a repeal by implication of the previous acts, upon the subject of the valuation for custom-house purposes, of foreign coins other than the pound sterling, an examination of the legislation of Congress in regard to foreign coins becomes necessary. Such examination discloses the fact, that from the earliest history of the government to a comparatively recent period, three classes of laws in regard to foreign coins have existed, each class having a distinct and separate object.

"The first class embraces those laws which were passed to fix the rate at which foreign denominations of money are to be computed in American money at the custom-house, for the purpose of ascertaining the dutiable value of imported merchandise. Congress commenced as early as 1789 the system of collecting a revenue by means of duties upon imported goods, the duties to be computed upon the values of the goods in currency of the United States. Foreign invoices stated the values in the

* 11 Wallace, 92.

† 11 Id. 652.

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currency of the respective countries from which the goods were imported, and it of course became necessary to transmute these values thus stated into the currency of this country. Hence the eighteenth section of the act of July 31st, 1789, which was an act to regulate the collection of duties upon imported goods, provided 'that all foreign coins and currencies shall be estimated according to the following rates: each pound sterling of Great Britain at four dollars forty-four cents; each livre tournois of France at eighteen cents and a half.' . . . Similar legislation was had in the acts of August 14th, 1790, of March 2d, 1799, and in various years thereafter, including the act of May 22d, 1846, until the second section of the act of March 3d, 1873, which as has been said, specifically provides that the valuation therein given to the sovereign shall be applied to the valuations stated in the invoices at the custom-house. The statutes of this class are those of July 31st, 1789, sec. 18;* August 4th, 1790, sec. 40;† March 2d, 1799, sec. 61;‡ March 3d, 1801, secs. 1, 2;§ July 27th, 1842, secs. 1, 2;‖ March 3d, 1843;¶ May 22d, 1846;** March 2d, 1861;†† March 3d, 1873, sec. 2.‡‡ Each of the various acts in this class either referred in direct terms to the valuation of foreign coins for custom-house purposes, or are parts of general statutes imposing duties upon foreign goods, and obviously relate exclusively to the appraisal of merchandise when the value is by the invoice in foreign coin. For example, the act of July 27th, 1842,§§ provides that in all payments by or to the treasury, when it becomes necessary to compute the value of the pound sterling, it shall be deemed equal to $4.84, 'and the same rule shall be applied to appraising merchandise imported when the value is by the invoice in pounds sterling.' The language used in other statutes is of the following kind: 'In all computations of the value of foreign moneys of accounts at the custom-house of the United States;' 'in the computation of duties;' 'in computation at the custom-house.' Congress thus adopted an exact, well-defined, and uniform system for the ascertainment at the custom-house of the dutiable value of foreign goods, which system, as will be seen, has always materially differed from the system of valuation placed upon foreign coins for the payment of debts.

* 1 Stat. at Large, 41. † Ib. 167. ‡ Ib. 673.
§ 2 Id. 121. ‖ 5 Id. 496. ¶ Ib. 625.
** 9 Id. 14. †† 12 Id. 207. ‡‡ 17 Id. 602.
§§ 5 Id. 496.

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Statement of the case.—Opinion of the court below.

"In the infancy of the government, and until recently, foreign coin was in common circulation in this country. The duties under the revenue acts were payable in gold and silver coin, and hence it became necessary to establish the rates at which coin of other countries should be received in payment of debts to the government, and also as legal tender in payment of debts to individuals. Statutes establishing these rates constitute the second class of legislation on the subject of foreign coinage. Thus the thirtieth section of the act of July 31st, 1789, the same act from which I have heretofore cited, provided that 'the duties and fees to be collected by virtue of this act shall be received in gold and silver coin only, at the following rates, that is to say, the gold coins of France, England, Spain, and Portugal, and all other gold of equal fineness, at eighty-nine cents for every pennyweight.' The eighteenth section had provided that all foreign coins and currencies shall be estimated (for custom-house computations) according to a different rate. This section prescribed the rate at which coin shall be received in payment of duties the amount of which was ascertained by the aid of the eighteenth section. So the act of February 9th, 1793,* provided the rates at which foreign coins should be received as legal tender 'for the payment of all debts and demands;' and a series of statutes of the same character was passed, from time to time, until the act of February 21st, 1857.† But it was never supposed that this class of acts, passed for the purpose of establishing the value of foreign coin, when used in payment to the government or between individuals, had any relation to the first-mentioned class. The second series was enacted for a different object and purpose. For example, when Congress provided, by act of March 3d, 1843,‡ that the gold coins of Great Britain should be receivable by weight for the payment of all debts and demands at prescribed rates, such act evidently did not repeal the law of the previous year, by which the pound sterling was estimated for custom-house purposes.

"The second series of statutes existed until the act of February 21st, 1857,§ the third section of which act repealed 'all former acts authorizing the currency of foreign gold or silver coins, and declaring the same a legal tender in payment for debts.' The same section also provided that 'it shall be the duty of the

* 1 Stat. at Large, 300. † 11 Id. 163. ‡ 5 Id. 607. § 11 Id. 163.

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Director of the Mint to cause assays to be made from time to time of such foreign coins as may be known to our commerce, to determine their average weight, fineness, and value, and to embrace in his annual report a statement of the results thereof.' This provision was in continuation of the third series of laws which had been passed on the subject of foreign coinage, whereby the mint was made the instrument for estimating the value of foreign coins.

"Perhaps the germ of this class of legislation may be found in the last clause of the act of February 9th, 1793,* the act which established the rates at which foreign coins should be received as legal tender, and which clause provided that 'no foreign coin, that may have been or shall be issued subsequent to the 1st day of January, 1792, shall be a tender as aforesaid until samples thereof shall have been found by assay, at the mint of the United States, to be conformable to the respective standards required, and proclamation thereof shall have been made by the President of the United States.' This provision simply had reference to the rate at which coins—the value of which was then unknown to Congress—should be received in payment of debts; but Congress thereafter provided, in the act of April 10th, 1806,† as follows: 'And it shall be the duty of the Secretary of the Treasury to cause assays of the foreign gold and silver coins made current by this act to be had at the mint of the United States at least once in every year, and to make report of the result thereof to Congress, for the purpose of enabling them to make such alterations in this act as may become requisite from the real standard value of such foreign coins. And it shall be the duty of the Secretary of the Treasury to cause assays of the foreign gold and silver coins of the description made current by this act, which shall issue subsequently to the passage of this act, and shall circulate in the United States, at the mint aforesaid, at least once in every year, and to make report of the result thereof to Congress, for the purpose of enabling Congress to make such coins current, if they shall deem the same to be proper, at their real standard value.'

"With the clauses of the act of 1806, just quoted, the third class of legislation in regard to coinage definitely commenced. This provision, passed for the purpose of furnishing information

* 1 Stat. at Large, 300.

† 2 Id. 374.

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to Congress, by the aid of which proper alterations might be made in existing rates at which coins shall be received in payment of debts, continued until the act of February 21st, 1857, supplemented by similar acts of April 29th, 1816, June 25th, 1834, and March 3d, 1843. The act of February 21st, 1857, repealed all acts relating to the use of foreign coin as a legal tender, but continued the requirement upon the Director of the Mint to cause assays of foreign coins, to determine their average weight, fineness, and value, and to report annually to Congress the result of such assays. The object of this provision was not to ascertain the rates at which foreign coin should pass current in the country, for the use of foreign coin as currency ceased upon the passage of this statute, but it was obviously for the purpose of furnishing official information to Congress and to the various departments of government, so that their payments in foreign coin could be regulated, and to the public, so that courts and individuals should have accurate knowledge of the rate at which foreign coin should properly be estimated in our own currency. These provisions of the acts of 1806 and of 1857, continued until the act of March 3d, 1873, were annually complied with by the Director of the Mint, and, with the first class of laws, constituted, after 1857, the only two existing series of statutes on the subject of foreign coin.

"The question now is, whether the first section of the act of 1873 is a repeal of the first class of laws, and of the entire system of valuation of foreign coins for custom-house purposes, or is the establishment of a new principle for the valuation of foreign coins for other purposes, and an instruction to the Director of the Mint to make such new estimate in addition to, or in alteration of, the system of assays which had previously been the means of information which Congress and the public possessed in regard to the value of foreign coins.

"I cannot think that Congress intended in the first clause of the section to repeal the exact and uniform system of custom-house valuations which had existed since the year 1798, and to substitute therefor an entirely new system, by which the valuation of foreign coins was to be annually estimated and annually proclaimed. If Congress had intended such a change, it seems to me that they would have used apt and appropriate language, by which their intent would have been rendered obvious. Such language was within the reach of the draughtsmen, and it was

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used in the second section. It is true that the language of the section in question is positive and broad, 'That the value of foreign coin as expressed in the money-account of the United States, shall be that of the pure metal of such coin of standard value,' but from the history of the legislation in regard to the subject of foreign coins, the intent and object of the laws seems to me to have been a modification of the third series of laws rather than of the first. Theretofore, the sole method of estimating values had been by assay of the coins in circulation; the Director of the Mint annually ascertained the average weight and fineness of the actual coin, and communicated the result to Congress. The valuation which these results placed upon foreign coins—the valuation known to the public, recognized by individuals, and by the departments of the government—'the valuation of foreign coin, as expressed in the money-account of the United States,' was, prior to the act of 1873, the average value of such coin in circulation as determined by annual assays. Congress now establishes a new rule by which the Director of the Mint is to be guided, and declares that the valuation which the government deems to be based upon a correct principle is the valuation of the ideal rather than the actual coin, and that thereafter the value shall be deemed that of the pure metal of such coins of standard value; and in order that Congress and the public shall have the knowledge of the valuations thus placed upon foreign coins, that the Director of the Mint shall annually estimate, and the Secretary of the Treasury annually proclaim, the result of the estimate.

"The former plan was to ascertain values by assays of the coin in use. That valuation was the official valuation furnished to Congress and the public. A new method and system of valuation is now prescribed to be made by the Director of the Mint, to wit, that the value of foreign coin expressed in money of account of the United States shall be that of the pure metal of such coin, and that the new rule shall be annually reduced to practice, and its results communicated by the Secretary of the Treasury for the benefit of the public. It may well be that Congress intended to impose upon the various departments the duty of making payments and of regulating their accounts with officers of the government abroad in accordance with the new rule. This official valuation annually proclaimed may be the one by which courts should estimate the value of coins men-

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tioned in contracts which are the subject of litigation. I do not think that it was intended to be the standard of values in a department of business for which a special series of acts has always made provision, and in which a special system of valuation has always existed different from the valuation imposed upon foreign coins when used as a legal tender. The intent to repeal that series of acts does not plainly appear.

"It may be argued that the first section of the act under consideration is analogous to the provision contained in the sixty-first section of the act of March 2d, 1799, '*Provided*, That it shall be lawful for the President of the United States to cause to be established fit and proper regulations for estimating the duties on goods, wares, and merchandise imported into the United States in respect to which the original cost shall be exhibited in a depreciated currency, issued and circulated under the authority of any foreign government.' It is to be observed that the proviso of the act of 1799 had reference exclusively to the manner in which a confessedly depreciated currency issued under authority of any foreign government should be estimated, and was limited to such exceptional case. But, not to dwell upon this suggestion, the object of this proviso was upon its face avowedly for the purpose of 'estimating the duties on goods imported into the United States.' The question here is whether the first section had any such object in view; whether the object was not totally different. Because the act of 1799 specifically conferred upon the President the duty of establishing regulations for estimating the duties on goods in respect to which the cost shall be exhibited in a depreciated currency, it does not follow that the act of 1873 conferred upon the Secretary of the Treasury power to proclaim annually the value at which all goods shall be estimated when such power has not been conferred in terms.

"My conclusion is that the first section of the act of March 3d, 1873, and the act of May 22d, 1846, do not cover or embrace the same subject, and that the former section was not intended as a substitute for the act of 1846, and kindred statutes, but was intended for other and different purposes than those which are specified in the class of statutes of which the act of 1846 is a part. I am, therefore, of opinion that the act of May 22d, 1846, is not repealed, and consequently, in determining the dutiable value of the several importations mentioned in the agreed state-

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ment of facts, the franc should have been estimated at 18$\frac{6}{10}$ cents."

Judgment was accordingly entered for the plaintiffs, and from that judgment the case was now brought by the government here.

Mr. G. H. Williams, Attorney-General, and Mr. C. H. Hill, for the United States; Messrs. W. M. Evarts and Sidney Webster, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The court below decided that the case was to be governed by the act of 1846, and that the act of 1873 did not cover or embrace it. The correctness of this decision is now before us for review.

Of course the act last in date must prevail if it covers the case. Its language is, therefore, to be carefully examined. The important words of the first section are as follows:

"The value of foreign coin, as expressed in the money of account of the United States, shall be that of the pure metal of such coin of standard value."

The plain meaning of this language is, that the value of foreign coins, in United States money, shall be measured by the amount of pure metal contained therein when of standard value; that is, when of the weight and fineness required by the laws and regulations of the country where they are produced. This value having been duly ascertained and published by the superintendent of the mint and the Secretary of the Treasury, becomes the rule in the cases and for the purposes to which, according to the fair meaning of the act, it is to be applied. In what cases and to what purposes it is to be applied is not expressed by the statute, but is to be gathered from its general terms, from the context, and from an examination of other statutes passed *in pari materiâ*. The government contends that it is to be applied in all cases where the estimation of the value of foreign moneys of account is required by law; and that its principal and perhaps most important purpose is the very one in question, namely,

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the estimation of the invoice values of imported goods chargeable with ad valorem duties.

This would seem to be, *primâ facie*, the correct construction of the act. The second section proceeds, at once, without any inquiry of the Director of the Mint, or any further investigation of the subject, to adopt this very method of computing the value of the sovereign or pound sterling, the most important foreign coin with which the financial operations of this country are concerned, and to direct that such computation shall be applied to the valuation of invoices of imported goods, and to other specified cases in which the value of the pound sterling is necessary to be ascertained. The value of the sovereign or pound sterling, fixed by this section is four dollars, eighty-six cents, six and a half mills. This is precisely its standard value computed in reference to the amount of pure metal contained in it when of standard value according to the mint regulations of England, and estimating that metal according to the amount contained in the United States dollar. Although the sovereign, or pound sterling, as a coin has only existed since the year 1817, the amount of pure gold contained in the pound sterling (estimating the guinea at twenty-one shillings) has been 113.001 grains ever since the year 1717; and as the United States dollar contains 23.22 grains of pure metal, it only requires a process of simple division to show that the value of the sovereign is precisely what the second section of the act determines it to be. This intrinsic value of the pound sterling, as represented by the gold coins of England, was a matter of such public notoriety as to need no extraneous inquiry on the subject. It was the public law of the British empire during the period of our own colonial history, of which all our courts were required to take judicial notice; and its continuance to the present time is a public fact as well established as any other act of the British government. In addition to this, the Finance Committee of the Senate, in reporting the act of 1873, stated the value of the pound sterling, computed in the manner referred to, as an ascertained fact. There were also other reasons, if any were needed,

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having respect to the fictitious par of exchange so long persisted in by the bankers of both countries, which made it expedient for Congress itself to fix the value of the pound sterling. But the material fact in this inquiry is, that it fixed that value on precisely the same principle which it is claimed by the government is laid down in the first section for ascertaining the value of all other foreign coins, and specified the purposes to which such valuation should be applied, amongst which is that of computing the value of invoices of imported goods. And it seems to us clear that the two sections have, in this regard, substantially the same objects in view; that it was the object of the first section to establish a method of computing the value of other foreign coins, similar to that employed in the second section in computing the value of the sovereign, and to apply such computation in the same cases and for the same purposes. Otherwise there would exist two differing methods of computing the values of foreign coins, and two differing rules for estimating the values of goods imported from different countries, giving a different value to goods imported from one country from that given to goods of the same cost imported from another country.

And it seems to us (although that is a matter of legislative cognizance) that the statute adopts the true method of computing the value of foreign money. The basis of our dollar of account (when not affected by the exceptional condition of legal-tender notes) is the standard gold dollar of 25.8 grains, containing one-tenth alloy. The actual coinage in circulation may be slightly diminished in value by abrasion, and this may have some effect on the dollar of account. But the same thing is true in other countries as the assays at the mint have shown; and the true method of comparing their money of account with ours, when both are based on actual coin, is to compare the standard coins of the two countries in a perfect state, and to ascertain the actual amount of pure metal in each. This is the result at which Congress seems to have arrived, and, as we think, wisely.

In making the comparison of the moneys of different

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countries their gold coins, if they have such, are employed for the purpose; gold having become the general medium of international exchange, whilst silver is regarded more as a domestic coin, and is usually made a legal tender for only limited amounts. This practice, together with the rejection of the alloy from the estimate, is in accordance with the rules laid down on the subject by the most enlightened economists.

Computed in the manner required by the law, the value of the franc is ascertained to be nineteen cents and three mills, as contended for by the government. This is the result of the examination and estimate made by the Director of the Mint and announced by the Secretary of the Treasury.

But the defendants in error insist that an examination of prior statutes on the subject of coins and their valuation, demonstrates that the act of 1873 was not intended to fix the value of the franc or of other foreign coins for the purpose of ascertaining the amount of invoices of imported goods, but for the purpose of giving general information on the subject, or of estimating the value of contracts in legal proceedings, or for some other purpose.

We have carefully examined the statutes for the purpose of ascertaining the soundness of this suggestion, but have failed to see anything in the legislation on the subject requiring us to adopt it. It is true that some of the laws have had for object simply the valuation of foreign coins for the use of the custom-house in computing the amount of invoices; others have fixed the value of such coins when receivable in payment of public dues, or when used as legal tenders in the payment of debts; and others have had still other purposes and objects. But how this general fact can affect the express mandatory terms of the act of 1873, we fail to perceive. Those terms are that the value of foreign coin, as expressed in the money of account of the United States, *shall be* that of the pure metal of such coin of standard value. This simple and sensible rule abrogates previous regulations on the subject. It is inconsistent with them, and the third section of the act expressly repeals all acts and

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parts of acts inconsistent with its provisions. No resort to a repeal by implication is necessary.

Of course the act of 1873 does not make foreign coins receivable in cases where they were not receivable before; but where they are receivable, or where their value is material to be known, the rule for ascertaining that value is clearly laid down and determined by the law. It is true it does not itself fix the values of foreign coins except in a single instance where special reasons require it; and it is doubtful whether the attempt to do so would have been as judicious as the method adopted. Those values are now to be carefully ascertained and publicly announced by the proper officers of the government. This method will insure the greatest accuracy, and will be attended with many public benefits. It is just, both to the government and the importer, because it is founded on truth; and it will be a great convenience to all persons who have any transactions in which the value of foreign money is in any way involved.

JUDGMENT REVERSED, and the record remitted, with directions to the Circuit Court to award

A VENIRE DE NOVO.

MASON v. GRAHAM.

1. The patent of E. H. Graham, of October 16th, 1860, reissued May 28th, 1867, for "picker-staff motion in looms," has no relation to the mere form of a journal-bearing arm, nor does it consist in arranging a journal-bearing arm in a slot in the rocker. It embraces every combination of a rocker with a bed and loose journal-bearing arms, arranged so as to produce the result described in the specification as effected by the combination.
2. Inasmuch as the defendant (who was alleged to infringe this invention of Graham) employed a combination of a rocker with a bed by loose journals projecting on each side the picker-staff, and the combination was effected by means of a journal-bearing arm, it was *held*, to be unimportant that the form of his journal-bearing arm was unlike that of the complainant's, or that its mode of attachment was different, so long as it performed the same function in substantially the same way.

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Statement of the case.

3. Where the defendant had been in the habit of selling the infringing picker-staff motion both separately and in a form where they were attached to looms, regard should be had, in ascertaining his profits upon those sold with the looms, to his profits upon those sold separately rather than to the aggregate profits made by him upon the loom and attachment combined.
4. If a defendant has cheapened the cost of producing the infringing device by an improvement of his own, he is entitled to a corresponding credit in the ascertainment of the profits, which a complainant is entitled to recover.
5. After an interlocutory decree and reference to a master in a suit against M., a manufacturer and seller of infringing machines, the owners of the patent commenced proceedings against persons who *used* machines made and sold by M. M. thereupon, to protect his customers, paid the patentees a sum fixed upon, under a written agreement that the payment should be "in full satisfaction of our right to collect back damages for past infringement" by M.'s customers, and a license fee for the future use of all the machines sold by M.; but the agreement contained a proviso that this settlement should "not affect *in any manner* our right to recover profits or damages" from M., and that the suit against M. "shall proceed *precisely* as if this settlement had never been made." *Held*, that the amount paid to the patentees by M. was properly excluded by the master as a credit in computing profits made by M.

APPEAL from the Circuit Court for the District of Massachusetts, in which court E. H. Graham filed a bill against one Mason for injunction and account; the bill being founded upon letters-patent for an "improvement in picker-staff motion for looms," granted to him, October 16th, 1860, and reissued May 28th, 1867; which patent and reissue the bill alleged that a machine of Mason, the defendant, infringed.

The object of the invention patented to the complainant was to produce an accurate and sure picker-staff motion in looms by a combination of devices, which, while giving great accuracy of motion, should so guide and hold the picker-staff as to enable it to work with the least possible friction and lateral disarrangement, commonly called "wabbling."

In all picker-staff motions it is desirable, if not essential, that the end of the staff made to strike the shuttle should move in a right line, so as to drive the shuttle directly along the shuttle-race in the line in which it is desired to play.

This has been effected by constructing the lower end of

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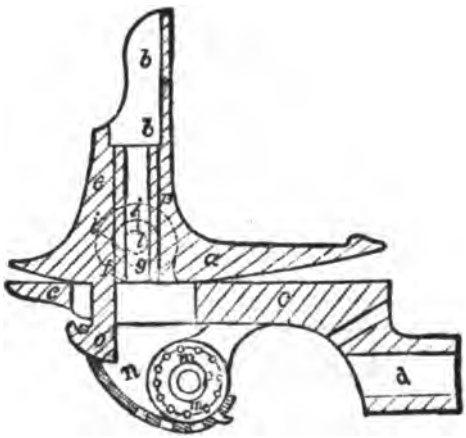
the staff in the form of a rocker, the exterior curve of which is an arc of a circle described from a centre corresponding with that point in the staff that strikes the shuttle. This rocker is made to roll on a bed, the face of which is extended parallel to the shuttle-race, and which is placed on the outside of the loom beneath the lay. How to connect the rocker with the bed, so that the picker-staff may be maintained in proper position upon the bed, had been a subject of much inquiry. Various modes had been suggested before the complainant obtained his patent, and several of these modes had been described in patents for improvements in looms granted to other inventors.

The invention of *Graham*, the complainant, is shown in the following drawings:

FIG. 1.



This figure represents a vertical central longitudinal section through so much of a picker-staff and its appurtenances, embracing the said improvements, as is necessary to illustrate the invention.

Figure 2, upon the following page, is a perspective view of same.

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FIG. 2.

Figure 3 represents a central longitudinal horizontal section through the retracting spring of the picker-staff and its cylinder

FIG. 3.

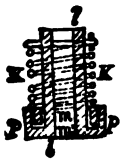
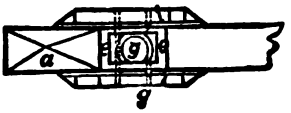


Figure 4 is a plan or top view of Figure 1.

FIG. 4.



The description in the reissue was thus:

"In these figures, *a a* represent a curved rocker, in the socket *b b*, of which the picker-staff is to be fastened. The rocker *a a* plays upon a horizontal bed, *c c*, having a socket *d*, through which the shaft of the loom passes in the usual way. The shank, *e e*, of the rocker, *a a*, is made hollow, or with a suitable box or bearing, *f f*, into which a shaft arm or bar, *g g*, is inserted, which arm, by means of journals projecting on each side thereof, has

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a bearing in the eyes, *i i*, formed in the bed-piece, *c c*. By this arrangement, the rocker (in its reciprocating movement) is kept perfectly true in its bearings by the arm or bar, *g g*, which holds the rocker, *a a*, truly in position, in consequence of its long bearing therein; and as the arm or bar, *g g*, also oscillates freely upon its journals, *h h*, which further serve to steady the rocker laterally, the rocker moves with the least possible friction, and with the greatest accuracy, so that the wear and tear is necessarily but very slight. The eyes or bearings, *i i*, have inclined slots (shown in dotted lines in Figure 1) cut in them, so as to form ears or open boxes in which the journals, *h h*, are inserted when the parts of the picker motion are put together. By this means, the shaft or arm, *g*, and its journals, *h*, can readily be removed and replaced, and are free to play without liability to work out of their bearings. The rocker, *a a*, is retracted by means of a spiral spring, *k k*, wound loosely around a short shaft, *l*, and attached at one end to a plate, *m*, which turns freely on the shaft, *l*. A strap, *n*, attached to the plate, *m*, fits over a hook, *o*, on the under side of the rocker, *a a*. As the spring, *k k*, is liable to partially lose its force by the motions of the rocker, *a a*, this contingency is provided for by forming in the plate, *m*, a series of holes, *p p*, into which successively one end of the spring, *k k*, is set, as fast as it loses its elastic force, whereby the spring can be set up at pleasure, and its force graduated without the necessity of frequent repairings or renewals."

The reader thus sees that the invention described is primarily a combination of a rocker with a bed by means of loose journals projecting on each side of the picker-staff, and arranged beneath it substantially as described in the specification. As in other arrangements for picker-staff motions, the rocker is made to play upon a horizontal bed, parallel to and below the shuttle-race, and the bed has a socket passing longitudinally through its base, for the passage of the shaft of the loom. The shank of the rocker is made hollow, that is, with a box or bearing extending through its tread upward, into which a shaft-arm or bar is inserted. This bar or shaft-arm is fitted with journals projecting on each side at right angles with the rocker, and resting in eyes formed in the bed-piece, which constitute the journal bearings. The

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eyes have inclined slots cut in them, so that they form ears, or open boxes, into which the journals are inserted when the parts of the picker-stiff motion or the constituents of the combination are put together. Thus the shaft and the journals can readily be removed and replaced, and the journals are free to play without working out of their bearings. The rocker is retracted and caused to move by means of a spiral spring, wound loosely around a short shaft below the bed, and attached at one end to a plate which turns freely on the shaft; and the plate is connected by a strap with a hook extending from the under-side of the rocker, or the lower end of the shaft-arm.

The reissue continued:

"The first part of this invention relates to the position of the journals. This position is determined by the position of the socket for the picker-staff, which socket is so placed that the point of the picker-staff which strikes the shuttle must move in the required line; and this part of the invention consists in placing the journal at or near this socket, and as near the level of the bed as practicable. In this position there is the least possible wear, and the journals perform all their functions to the best possible advantage. It is obvious that as every point upon the rocker varies its position in the action of the motion, with reference to the bed, it is impossible to connect the journal directly with the rocker and its box directly with the bed, or *vice versa*. One or the other must be indirectly connected, and it is for this reason that in the motion described the journals are placed upon the arm *g*, upon which the rocker can play up and down. So far as we know, no rocker has ever been combined with its bed by means of journals before this invention."

"The second part of this invention consists in forming the boxes or bearings for the journals with such an opening that the journals may be laid in them in putting the motion together, without liability to work out in the operation of the rocker, as plainly shown in the drawings. This method of construction is much cheaper than making the boxes cylindrical, and is quite as efficient in every respect."

The claims of the reissue were as follows:

"1st. The combination of a rocker of a picker-staff with its

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hed, by loose journals, projecting on each side of the picker-staff, and arranged beneath the picker-staff, substantially as described.

"2d. In combination with the rocker, the bed and the journals, the open boxes, substantially as and for the purpose described.

"3d. In combination with the rocker and its bed, the journal-bearing arm, operating substantially as and for the purpose specified."

The devices of *Mason* (the defendant) are shown in perspective in Figure 5; and a vertical section, in central plane, of the rocker, is shown in Figure 6.

FIG. 5.

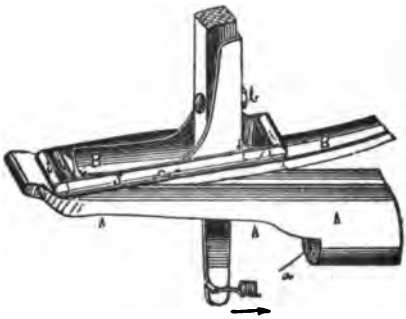
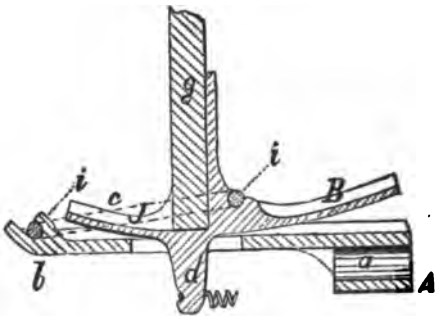


FIG. 6.



These drawings were thus described in the defendant's patent:

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Statement of the case.

"*A* represents the rocker-bed, cast with a socket, *a*, at one end, by which it is attached to the loom. The upper surface on which the rocker works is, as usual, straight, in the direction of the length, but in the cross-section it is made concave, of a V-shape, to within a short distance of the outer end, where it is formed with a cross semi-cylindrical box, *b*, to receive one end of a link, to be presently described; and near the middle of its length it is formed with a vertical mortise, *C*, through which the stem of the rocker passes, and in which it plays freely.

"The rocker, *B*, longitudinally is, as usual, in the form of a segment of a circle, but in the cross-section it is of an inverted V-shape, to fit the concave of the bed. It has a short stem or arm, *d*, which extends through the mortise, *c*, in the bed, and by which it is, as usual, connected with a spring for drawing back the picker-staff. The upper part is suitably formed with an open socket, *e*, to receive, and in which is secured by a screw-bolt, *f*, the lower end of the staff, *g*. Back of the socket, *e*, it is formed with a cross semi-cylindrical box, *h*, like the one, *b*, at the outer end of the bed, *A*.

"There is an open link, *c*, consisting of two cylindrical journals, *i i*, connected by side-bars, *J J*. One of the end journals fits and works in the semi-cylindrical box, *b*, at the outer end of the bed, *A*, and the other in the semi-cylindrical box, *i*, of the rocker. As the tension of the usual spring attached to the arm, *d*, of the rocker tends to draw the rocker in the direction of the arrow, the link, *c*, keeps it in its right place on the bed, and by reason of its end journals working in the semi-cylindrical boxes, permits the required rocking motion to take place freely, whilst at the same time the form of the upper surface of the bed, and of the under surface of the rocker, prevents the picker-staff from wabbling or moving sidewise.

"By the mode of construction above described, I am enabled to make the whole structure of three pieces, the bed, *A*, the rocker, *B*, and the open link, *c*, each of which can be readily cast, and the three put together and used without any finish beyond the usual cleaning operation to which castings are subjected."

The claim of *Mason* was as follows:

"The bed, formed with a V-shaped groove, and the rocker, with its under surface of the corresponding form, in combination

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with the open link, by which the rocker is kept in place on the bed, substantially as and for the purpose set forth."

It was not disputed that the defendant's machine was the same as that described in the complainant's patent, in these respects, viz.:

1. Each consisted of three main parts, the rocker, the bed, and a third piece whose office it was to hold the rocker properly upon the bed.

2. The rocker and the bed were the same in each.

The principal question for consideration of the court below was: Whether the device for holding the rocker upon the bed in the defendant's machine was the substantial equivalent of the corresponding device in the complainant's machine?

These devices in each machine were described as follows:

In the complainant's machine the rocker, *a*, in its reciprocating movement, was kept true in its bearings by the arm or bar, *g*, which held the rocker in position; the bar, *g*, oscillated upon its journals, *h h*. The eyes or bearings for the journals had inclined slots, *i*, cut in them, so as to form open boxes, in which the journals were inserted.

In the defendant's machine there was an open link, *c*, consisting of two cylindrical journals, *i i*, connected by side-bars, *J J*. One of the end journals fitted and worked in the semicylindrical box, *b*, at the outer end of the bed, *A*, and the other in the semicylindrical box, *i*, of the rocker. As the tension of the usual spring attached to the arm, *d*, of the rocker tended to draw the rocker in the direction of the arrow, the link, *c*, kept it in its right place on the bed, and by reason of its end journals working in the semicylindrical boxes, permitted the required rocking motion to take place freely.

One of the defences—one, however, not much pressed—was that the invention of the complainant, Graham, had been anticipated by prior devices.

Of these four only need be noticed. They were described in the earlier patents granted to Benjamin Lapham, to David Barnum, to Renselaer Reynolds, and to William Stearns

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While each of these had a rocker and a bed, no one connected the rocker with the bed by means of loose journals, or by loose journal-bearing arms, and no one of them obtained the beneficial results secured by the invention belonging to the complainant. In Lapham's invention there was one journal on the bed and one on the rocker, both on the same side of the picker-staff; a device which obviously could not prevent wabbling, or the sliding of the rocker on the bed. Barnum's invention had no journals, journal-boxes, or journal-bearing arms. Nor had the device of Stearns. In the Reynolds patent the rocker was described as held to the bed by means of a strap fastened at one end to the under face of the rocker, and at the other to a point in the groove of the bed-piece, in which the rocker rolled.

The defendant referred to the four patents above mentioned as exhibiting the state of the art when the complainant's patent was granted, and as requiring that patent to be construed to cover only a combination, of which a journal-bearing arm sliding vertically in a hollow place or box in the rocker, and having journals which turn in open boxes in the bed-piece, is an essential constituent.

The court below held that the invention of Graham had not been anticipated by any of the devices relied on to show anticipation; that the patent of the complainant was infringed by the machine of the defendant, and a decree was entered ordering the defendant to account, and referring the case to a master to state an account.

This decree and reference was made on the 9th of June, 1869.

The master reported that the defendant had made and sold 3639 pairs of the infringing motions as a part of looms manufactured in his establishment, and that the profits resulting from the manufacture and sale of such motions had mingled with the profits from the manufacture of looms:

That the cost of making the looms, including the motions, was $59.63:

That the cost of making the motion was 45½ cents each, or 91 cents for each loom:

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That the profits resulting from the manufacture of each loom, including the pair of motions, was $5.64.

Assuming these to be the facts, the appellant insisted that he should have been charged with only $8\frac{6}{10}$ of a cent as the profit made by him on each pair of motions, that bearing the same proportion to $5.54, the whole profit on the looms, which 91 cents, the cost of a pair of motions, bears to $59.63, the cost of the entire loom with the motions. This view the master refused to take.

It appeared further, from the master's report, that the defendant sold 414 pairs separately from the looms at $2 per pair, and 297½ other pairs for $534.75.

It appeared, however, from the report that the defendant made the infringing motions after a pattern of his own devising; that they cost 50 cents per pair less than the picker-staff mechanism, which he had immediately before put upon his looms; that they were made under a patent granted to him, and that they cost about 50 cents less than the motions made by the complainant, the difference in the cost being due to his invention.

It seemed, also, that the cost of making "beds" and "rockers," which were used in the repair of bridle-motions previously made, had been reduced by the defendant; the defendant's bed costing but $27\frac{2}{10}$ cents, and his rocker but $12\frac{4}{10}$ cents, whereas those of the complainant cost, the bed 42 cents and the rocker $19\frac{3}{10}$; the reduction obtained by the defendant being due in part to the fact that the labor required in putting together the arm and rocker in his motion was less than in putting them together in the complainant's.

The report charged the complainant with—

3639 pairs bridle-motions, sold on looms to sundry parties at a profit of 50 cents per pair, ...		$1819 50
The profit derived from the sale of the 414 pairs of motions, sold separately from the looms, at $2 a pair, .	$828 00	
Less cost of producing at 91 cents per pair, . .	376 74	
		451 26
It charged him also with the sale of the		
297½ motions sold separately from the looms, . .	$534 75	
Less cost of producing at 91 cents per pair, . .	271 75	
		263 00

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Statement of the case.—Master's report.—Profits.

The master also charged the defendant as follows:

346 beds (parts of bridle-motions), sold at various prices, amounting in all to	$313 00	
Deduct cost at 27 1/10 each,	94 11	
Profit,		$218 89
1548 rockers (parts of bridle-motions), sold at various prices, amounting in all to	$768 70	
Deduct cost at 12 4/10 each,	191 95	
		576 75
		$3329 40

On the hearing before the master the defendant sought to reduce the damages found by him by the introduction of a paper, admitted to be genuine and signed by the complainant. The paper was given under these circumstances: Graham, the complainant, had obtained injunctions against certain mill companies who had bought their motion from Mason, the defendant, *he, Mason, having guaranteed them against disturbance by Graham.* Graham, the complainant, was about to apply for injunctions against other purchasers from Mason, who had purchased and were holding in the same way. And Mason, acting really in behalf of the persons using the motions, and in a certain sense as their agents, rather than as representing himself alone, had paid the $1000 mentioned in the paper to protect them from all claims of Graham. The bill in the case had been filed in June, 1867, and as already said, the decree was made June 9th, 1869:

"BOSTON, October 25th, 1869.

"Received of William Mason, of Taunton, $1000 in full satisfaction for our right to collect back damages for the past infringement of reissue letters-patent of May 28th, 1867, for picker-staff motions, *by the individuals and corporations who have used bridle-motions of Mr. Mason's make*, and as tariff for the future use of *such* motions. It is understood and agreed that the number of these motions does not exceed five thousand four hundred and fifty-one, and that Mr. Mason is to furnish us with a list of the names of the users and the number sold by him to each, and that the bridle-motions enumerated in that list are all hereby licensed. This bridle-motion is the motion that has been pat-

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cuted by Mr. Mason. It is also understood and agreed that this settlement does not affect in any manner our right to recover profits or damages *from Mr. Mason* for his infringement of said patent, and that the suit of *Graham et al.* v. *Mason* shall proceed *precisely* as if this settlement never had been made. It is also understood that this agreement relates simply and solely to the bridle-motion, and no other, and licenses simply those bridle-motions of Mr. Mason's make not already licensed, and no others.

"E. H. GRAHAM,
"W. MASON."

Mason, the defendant, insisted that this $1000 should be added to the cost of the "bridle-motions," or in some way applied to reduce the amount of profits which should be found resulting from the manufacture. But the master refused to allow him any benefit from this payment. The master said:

"The money was paid by the defendant after the decree was passed in the case. It forms no part of the cost of manufacturing the 'bridle-motions' and cannot be here considered in reduction of the amount found as profits of manufacture. If this is a payment on account of the sum to be ultimately adjudged against the defendant in this case it is not within the matter submitted to the master by the decretal order."

The court below affirmed the report of the master, and a final decree being entered this appeal was taken from the same.

Mr. Benjamin Deane, for the appellant; Mr. J. E. Maynadier, contra.

Mr. Justice STRONG delivered the opinion of the court.

By the arrangement described in Graham's reissued patent of 1867, and claimed as his invention, it is manifest that that part of the device called the rocker is prevented from sliding perceptibly on its bed and is kept true in its bearings by the arm or bar from which the journals are projected, the arm having also a long bearing in the box of the rocker. The journals, moreover, having bearings in the ears of the

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bed, steady the rocker, resist any lateral movement, and prevent what is denominated as wabbling. As the picker-staff is made to oscillate, its rocker rises and sinks upon the arm, and thus most of the friction caused by the play of the staff comes upon the shaft, or journal-bearing arm, and not upon the tread of the rocker or the bed-plate.

We think the invention has no relation to any mere form of a journal-bearing arm. Nor do we think it consists in arranging a journal-bearing arm in a slot in the rocker. In our opinion it embraces every combination of a rocker with a bed and loose journal-bearing arms, arranged so as to produce the result described in the specifications as effected by the combination.

And we have been unable to perceive that the invention was anticipated by any of those devices which the defendant has given in evidence. We do not propose to go into any critical examination of them. The case does not call for it. Of them all it may be said that while each has a rocker and a bed, no one connects the rocker with the bed by means of loose journals, or by loose journal-bearing arms, and no one of them obtains the beneficial results secured by the invention belonging to the complainants. It is but faintly claimed, if at all, that any of these patents describe the invention of the complainants. The defendant has used them rather as exhibiting the state of the art when the reissued patent in question was granted, and as requiring that patent to be construed to cover only a combination, of which a journal-bearing arm sliding vertically in a hollow place or box in the rocker, and having journals which turn in open boxes in the bed-piece, is an essential constituent. We think, however, they exhibit no such state of the art as requires that construction to be given to the patent, and we cannot perceive that such a construction is justified by the language of the specification and claims.

We come, then, to the inquiry whether the devices made and sold by the defendant are substantially the same as those patented by the reissued patent; or, in other words, whether the picker-staff motion made and sold by the defendant is

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an infringement upon the complainants' right. Upon this question the opinions of the experts examined are in direct conflict, and we are, therefore, under the necessity of comparing for ourselves the two devices. We have already said that the object sought to be accomplished by the complainants' invention was the prevention of wabbling of the picker-staff, and compelling it to move steadily, without lateral deflection, in the required plane. It is not denied that exactly this is the object at which the defendant's motion is aimed. It remains, then, only to determine whether the means by which the intended result is obtained are substantially the same. That both the combinations connect a rocker to its bed by journals indirectly, employing an arm to effect such indirect connection, is made clear by inspection. In Mason's motion the arm is attached by a second journal, in the complainants' by a slot in the rocker. It is true the form and the location of the arms differ, but they perform the same functions, and in substantially the same manner. Both are journal-bearing arms. Both connect the journals, whether they are on the rocker or on the bed, indirectly with the bed in the one case, or with the rocker in the other. Each, then, is a combination of a rocker with a bed, by loose journals projecting on each side of the picker-staff, and the combination is effected by means of a journal-bearing arm. That the form of the journal-bearing arm of the defendant's motion is unlike that of the complainants', or that its mode of attachment is different, is immaterial so long as it performs the same function in substantially the same way. We are, therefore, of the opinion that the defendant's picker-staff motion must be considered as practically the same as that patented to the complainants, and, therefore, that the charge of infringement is sustained. The Circuit Court then correctly ordered that the defendant should account.

But we think there was error in the ascertainment of the profits with which he was charged. The master to whom the statement of the account was referred reported that the

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defendant had made and sold 3639 pairs of the infringing motions as a part of looms manufactured in his establishment, and that the profits resulting from the manufacture and sale of such motions had mingled with the profits from the manufacture of looms. He further reported that the cost of making the looms, including the motions, was $59.68; that the cost of making the motion was 45½ cents each, or 91 cents for each loom; and that the profits resulting from the manufacture of each loom, including the pair of motions, was $5.64. Assuming these to be the facts the appellant insists that he should have been charged with only 8$\frac{4}{11}$ths of a cent as the profit made by him on each pair of motions, that bearing the same proportion to $5.54, the whole profit on the looms, which 91 cents, the cost of a pair of motions, bears to $59.68, the cost of the entire loom with the motions. To this we cannot assent. It appears from the master's report that the defendant sold 414 pairs, separately from the looms, at $2 per pair, and 297½ other pairs for $534.75. These sales furnish a much better measure of profits than is a ratable proportion of the profits on an entire loom. It may fairly be presumed from them that the profits on the sale of looms, with the motion attached, were increased by the infringing device quite as much as was the profit on the motions sold separately. It does not appear at what profit, if any, the looms could have been sold without the picker-staff motion attached.

But the master further reported that the defendant made the infringing motions after a pattern of his own devising; that they cost per pair 50 cents less than the picker-staff mechanism which he had immediately before put upon his looms; that they were made under a patent granted to him, and that they cost about 50 cents less than the motions made by the plaintiffs, the difference in the cost being due to his invention. If this is so, it is clear that the 50 cents saved on each pair, equivalent to 50 cents profit, is not due to the complainants' invention. Were it not for the defendant's improvement the cost of making a pair of motions would have been, not 91 cents, but 91 plus 50 cents, or

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$1.41, and the profits on each pair would have been 59 cents, instead of $1.09 charged to the defendant. Manifestly the complainants are not entitled to the savings or profits resulting from the defendant's own invention.

The defendant, therefore, has been charged by the master's report, confirmed by the court, too much for the profit derived from the sale of 414 pairs of motions sold separately from the looms, and from the sale of 297½ motions also sold separately from the looms. For the former he should have been charged $243.26, instead of $451.26, and for the latter $175.52, instead of $263.

We think, also, that the defendant has been excessively charged for the profits made by him on the 346 beds, and the 1548 rockers sold by him at various times for the repair of bridle motions previously made. He has been credited with the cost only, without reference to the fact that the cost was reduced by his own invention. The complainants have not shown how much the cost would have been had the defendant made them without employing his own improvements. Under such circumstances it appears just to assume that but for the improvement of the defendant the cost of making the bed would have been 42 cents instead of $27\frac{8}{10}$, and the cost of making the rockers would have been $19\frac{8}{10}$ cents instead of 12 cents and 4 mills, as reported by the master. The consequence of this is that the profit on the 346 beds sold was only $167.68, and the profit on the 1548 rockers sold was only $471.49.

The decree, therefore, should have been in favor of the complainants for

1st.	Profits on bridle motions sold on looms, . .	$1619 50
2d.	Profits on 414 pairs sold separately, . . .	243 26
3d.	Profits on 297½ pairs sold separately, . .	175 52
4th.	Profits on the beds sold, ...	167 68
5th.	Profits on the rockers sold separately, . .	471 49
	Total, ...	$2877 45

A majority of the court is of opinion that the appellant is not entitled to a credit for the $1000 paid on the 25th of October, 1869, for which a receipt was then given.

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Statement of the case.

The decree of the Circuit Court is REVERSED, and the case is remitted with instructions to enter a decree in favor of the complainants against the defendant for $2877.45, with costs of suit in the court below. Each party to pay his own costs in this court.

REVERSAL AND REMAND ACCORDINGLY.

AMBLER v. WHIPPLE.

A rehearing will not be granted on the ground that the record on which the case was heard was imperfect, it appearing by an examination of the parts which on the original hearing were left out, but which were now brought up, that they presented nothing but matter which did not affect the merits of the case, or matter which only further established that which the court in giving its decree considered to be already otherwise abundantly proved.

THIS was a petition for rehearing, made in behalf of Whipple, the appellee, in an appeal from a chancery decree, in which a judgment of reversal and remand had been given in this court against him, at an earlier part of this term.*

The original case was thus:

Whipple, of the city of Washington, D. C., had formed a partnership in the year 1869, with a man of the name of Ambler, the purpose of the partnership being to generate gas from petroleum by a new process which Ambler professed to have discovered. Whipple was the man of business of the firm, and the person who furnished the requisite money to carry on the scheme. Ambler was a man of inventive genius, but of genius disfigured by so many irregularities and vices as to make it somewhat doubtful whether he was entirely sane. He would get, for example, into drunken debauches, from time to time, and when in them, lie, cheat, commit forgery (of which, indeed, he was at the time actually convict), and go away from Washington as

* 20 Wallace, 546.

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if he had no business there at all to attend to. About the 21st of August, 1869, Ambler being sober enough before and at the time, the parties made an experiment which resulted in a valuable and profitable discovery. Soon after this, that is to say, about the 1st of September following, Ambler having got into one of his drunken fits, went away from Washington, and was gone for eight or ten days while Whipple was bringing more nearly to perfection the experiment just mentioned, the success of which, in the main, had been already established; a success which was largely due to Ambler.

Having got through his debauch, Ambler returned to Washington, where he found that Whipple had taken another person into partnership with him, and that the two had combined to shut him out of the partnership workshops, and to treat him as no longer interested in the business of the firm.

Ambler hereupon filed a bill praying that the new firm might be enjoined from using the recent discovery, and that Whipple might account.

Whipple answered, setting forth Ambler's habits of debauchery, of lying, &c., and that he had abandoned the workshops at Washington—in which point of light the bill represented Ambler's recent departure.

Neither, however, in this answer nor in a cross-bill which he filed, did Whipple allege that Ambler's character and habits were not known to him as to very many other persons in Washington before the formation of the partnership. And in point of fact it seemed that they were perfectly well known to him as to others. No dissolution of the partnership was prayed for by either party.

This court on appeal from a decree made in the local court at Washington where the proceedings in the case were originally begun, decreed that though Ambler's bad character—his drunkenness, dishonesty, &c.—would have been good ground for dissolving the partnership had the partnership been entered into in ignorance of them by Whipple, yet that Whipple having been fully acquainted with them before the

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partnership was made, he could not now make them the excuse to treat the partnership as ended, and to take to himself all the benefits of the joint labor of the two partners and their joint property. And it appearing on the proofs, that notwithstanding all his foibles and vices, Ambler had greatly contributed by his inventive genius to the discovery which had been made on the 21st of August, 1869—contributed indeed quite as much as Whipple ever had by his money and his more steady habits—this court charged Whipple with half the profits made since his exclusion of Ambler from the workshops.

In narrating the facts of the case, before giving the opinion of the court upon them, the court spoke of Ambler's departure from Washington as having occurred *on the 20th of August.** In point of fact, as already said, he actually went from the city on the 1st of September, he having been lying about somewhere more or less intoxicated, as was said, for a day or two before he actually went out of town.

Such was the original case. The petition for rehearing now set forth that a large part of the matter which was before the court below had been omitted on the hearing before this court, and that such hearing was, therefore, upon a defective record. Affidavits accompanied the petition, by which it was attempted to be shown that owing to the death of one of the gentlemen employed as counsel, and the substitution of others, there was no laches or neglect in examining and perfecting the record before the hearing, for which the petitioner, Whipple, the appellee, should be held responsible. A transcript of the parts of the record which were omitted in the first transcript, now accompanied the petition for rehearing. They consisted of commissions to take depositions, of orders fixing the time, by extension or other-

* This slight and wholly unimportant inaccuracy of the court was noted by the Reporter as he was reporting the case, and in making his "statement of the case," no exact day in August was given; it being made to appear only that Ambler's departure was probably after the 21st. The error of the court, therefore, does not appear in the report with any point. In fact as is decided in this case, it had none in any aspect.

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wise, for taking testimony, of rules upon the parties to do various things preparatory to a final hearing, which did not affect the merits of the case; and of matters showing Ambler to have been drunk, vicious, negligent, and in contempt of court in the progress of the case.

The petition for rehearing stated the petitioner's case very fully, fortifying it, so far as it could be fortified, by references and extracts from both the original record and the supplemental one now brought up, and containing the parts which had been omitted.

As respected one of the points sought to be established by the affidavits—to wit, that Whipple, or his counsel, were without fault in not having sought before the hearing of the original case to perfect the transcript of the record—it appeared by an examination of the records of this court, that the appeal was docketed and dismissed February 19th, 1872, because the record had not been filed within the time limited by the rule of the court; that on the 1st of March, a motion to set aside that order was made, when the late Mr. Hughes, counsel for Whipple, the appellee, obtained time for one week to examine the transcript proposed to be filed, and it was within the recollection of the court, that this was on the ground that it was an incomplete record.

It further appeared by the same sort of evidence, that on the 8th of March, Mr. Hughes had an extension of time for this examination to the 22d, which made three weeks allowed for that purpose, and on that day the order of dismissal was set aside and the case docketed, on the transcript on which it was finally heard. The case was reached for argument at the October Term of 1873, and continued without objection, and on the 15th of October, 1874, was passed until the 13th of November by consent, and heard on the 16th and 17th of that month.

Mr. Justice MILLER delivered the opinion of the court.

It is the well-settled rule of this court, to which it has steadily adhered, that no rehearing is granted unless some member of the court who concurred in the judgment, ex-

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presses a desire for it, and not then unless the proposition receives the support of a majority of the court. For this reason, and for the better reason that the pressure of business in the court does not permit it, no reply to the petition whatever is allowed from the other side or given by the court.

The petition for rehearing in this case presents some features which seem to require a departure from this rule. It states that the hearing in this court was had on an imperfect record, that a large part of the matter which was before the court below had been omitted in the transcript certified to this court, and it attempts to show by affidavits that there was no laches or neglect for which the appellee should be held responsible in failing to examine and perfect the record before the hearing.

If this statement be correct, and if the omissions in the transcript on which the case was heard are material to the decision of the case, it presents a strong appeal for reargument; and we have, therefore, given a careful consideration to the very full petition for rehearing, and availed ourselves of its copious references to the original and supplemental transcripts.

But an examination of the proceedings in the case in this court sheds much light on a question suggested in the affidavits. The facts which are of record in this court, show that the sufficiency of the transcript on which the case was heard had been a matter of careful consideration by counsel for the petitioners, and that it was finally accepted and filed, and that for two years and a half it remained on the docket and no attempt to correct it by *certiorari* or otherwise was made. It cannot be said, in the face of these facts, even if the omitted parts of the record were material, that the appellee was without fault in failing to have it brought up.

But we have no doubt that Mr. Hughes, who was an experienced and careful lawyer, was satisfied, as we are, from an examination of this additional transcript, that it was wholly immaterial to any issue in the cause.

It consists of commissions, orders, and rules, which do not

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affect the merits of the case. It is filled with matter showing Ambler to have been drunk, vicious, negligent, and in contempt of the court, in the progress of the case. In short, if his cause was to be tried on *his merits* instead of the merits of his case, it shows enough, as the original record did, to defeat it.

All this is only in aid of the theory on which Whipple has rested his case and lost it, namely, that because Ambler was a very bad man, a drunkard, and a convicted felon, that he, his trustee and partner, could take to himself all the benefit of Ambler's skill and labor, disregard his double relation as trustee and partner, and violate every principle which governs these confidential relations.

The only error of fact pointed out in the opinion of the court, which is sustained by the record, is that Ambler, instead of leaving Washington about the 20th of August, the date of the successful experiment, did not leave the city until September the 1st, a difference wholly without influence on the points decided.

We remain of the opinion that the decree of this court was right, and the petition for rehearing is

DENIED.

THOMAS & Co. v. WOOLDRIDGE.

1. The court will not, generally speaking, refuse to hear a motion to dismiss, before the term to which, in regular order, the record ought to be returned, if the record be printed and the rules of court about motions of that sort have been complied with by the party making the motion.
2. Though a failure of the party making a motion to dismiss, to send a copy of his brief to the counsel of the other side within the time required by the amendment made at December Term, 1871, to Rule 6, would entitle such counsel of the other side to ask to postpone the hearing in order to give time for further preparation, yet if he have himself before the hearing filed a full argument upon the merits of the motion, the failure of his opposing counsel to have complied with the amendment to the rule would hardly warrant an objection that the notice of the motion was insufficient.

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Statement of the case.

3. A motion to dismiss an appeal in equity may properly be made by one of several appellees, he being the only one who has any interest in the suit, and the only one who filed an answer below.
4. An appeal will not lie from a decree dissolving an injunction unless there be a dismissal of the bill.

ON motion to dismiss an appeal from the Circuit Court for the Southern District of Mississippi. The case was thus:

In May, 1874, Wooldridge, of Kentucky, got a judgment in the Circuit Court just named, against Thomas & Co., of Mississippi, for $4800.

In June following, one Hedric, of Louisiana, a creditor of Wooldridge, attached in a State court of Mississippi, the judgment which Wooldridge had thus got, and summoned Thomas & Co. as garnishees. Notwithstanding this, the attorney of Wooldridge issued a *fi. fa.* against Thomas & Co., and the marshal was proceeding to levy and make sale of their property to satisfy it. They informed him of the attachment, and that they had been summoned as garnishees, and remonstrated against the levy. To this the marshal replied that his own fees in the suit of Wooldridge against them, and the fees of Wooldridge's attorney would take precedence of any lien made by the attachment. Thomas & Co. accordingly paid the marshal his own fees and those of the attorney, and a credit to this extent was entered on the *fi. fa.*

However, the attorney soon afterwards issued an *alias fi. fa.* for the balance.

Hereupon Thomas & Co. filed a bill against Wooldridge, *the attorney, and the marshal*, in the Circuit Court, where the judgment had been got against them, praying an injunction against all the parties just mentioned from any further attempt to collect the judgment got by Wooldridge, until the proceedings in attachment had been disposed of; the bill stating that the attorney was made defendant "by reason of his being attorney of the said Wooldridge, and not by reason of any personal interest of his own in the matters set forth in the bill." The bill prayed process against Wooldridge, the attorney, and the marshal, and that *Wooldridge*,

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as "the real party in interest," might be required to answer, and that he, the attorney, and marshal should be enjoined from proceeding until, as already said, the result of the proceedings in attachment should be seen.

The bill also prayed that if the complainants should be adjudged to pay the judgment-debt under the proceedings in attachment, Wooldridge might be perpetually enjoined from its collection.

Upon the filing of the bill an interlocutory injunction was allowed. An answer by Wooldridge, but not by either the attorney or marshal, and replication to the answer were afterwards filed and testimony was taken. On 1st December, 1874, Wooldridge moved to dissolve the injunction upon bill and answer filed, and on the same day the following order was made in the cause:

"This cause coming on to be heard upon the bill and answer filed, and the motion of the defendants to *dissolve the injunction* heretofore granted herein, and after hearing the argument of counsel, and being fully advised of and concerning the matters and things in the pleadings mentioned, the court doth order, adjudge, and decree, *that the said injunction be, and is hereby dissolved*, and that the complainants pay the costs of this proceeding."

Upon the petition of the complainants an appeal from this order was allowed on the 28th December, 1874, "to *supersede the order of dissolution and reinstate the injunction.*" Bond was filed on the same day to perfect the appeal.

This appeal having been allowed during the present term of this court, the appellants had by the general practice of the court until the next term to file the record here. Not waiting for the appellants to file the record, the appellee caused it to be done on the 9th February, 1875, and on the same day filed this motion to dismiss the appeal, on the ground that the order appealed from was not a final decree. On the 25th February the appellants were served, at Vicksburg, Mississippi, with notice for the hearing of the motion on the 22d of March, but the notice was not accompanied

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by a copy of the brief or argument to be submitted. The record had been printed.

An amendment to Rule 6, adopted at the December Term, 1871, orders that—

"All motions to dismiss appeals and writs of error (except motions to docket and dismiss under the ninth rule), must be submitted in the first instance in printed briefs or arguments. If the court desires further argument on the subject, it will be ordered in connection with the hearing on the merits.

"The party moving to dismiss shall serve notice of the motion, with a copy of his brief or argument, on the counsel for the plaintiff in error or appellant, of record, at least three weeks before the time for submitting the motion," &c.

However, in the present case, the appellants, before the day fixed for the hearing of the motion, filed a brief of six pages, going into the merits of the motion.

The record had been printed.

Mr. Joseph Casey, in support of the motion:

The decree below is not the subject of an appeal.

This court has decided, in *Moses* v. *The Mayor*, and previously, that an appeal does not lie from an interlocutory decree dissolving an injunction,* or refusing one.†

In *Thompson* v. *Dean*,‡ it is held that no decree is final which does not dispose of the whole case.

Mr. A. P. Pittman, contra:

This motion is made on the sole ground that there was no such final judgment in the court below as to sanction an appeal here. But—

1. Will this court entertain the motion at all before the

* Young v. Grundy, 6 Cranch, 51; Moses v. The Mayor, 15 Wallace, 387.

† Gibbons v. Ogden, 6 Wheaton, 448; United States v. Clarke, 9 Peters, 168.

‡ 7 Wallace, 342; and see Railroad v. Bradleys, Ib. 577; Stovall v. Bank. 10 Id. 583; Wells v. McGregor, 13 Id. 188; Insurance Co. v. Barton, Ib. 448; St. Clair Co. v. Lovingston, 18 Id. 628.

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return day of the record? Certainly its general practice is not to entertain motions to dismiss before such time.

2. If it will thus entertain the motion, is service of a copy of the motion, unaccompanied by any brief or argument, upon the attorney of record in the Circuit Court, sufficient notice under the sixth rule, and the amendments to it made at December Term, 1871?

3. A reference to the notice served will show that all the parties defendant to the case in the lower court are not parties to this proceeding to dismiss. The marshal and attorney have received no notice, though they were parties defendant to the bill. The notice of the present motion was given to Wooldridge alone. Is it not necessary that the former two parties should join in this motion, equally so as if they prayed an appeal or writ of error?*

4. Finally, and as to the main point. Was not the decree of the court below, dissolving the injunction, such a judgment as could be appealed from to this court?

Where injunction is the sole equity of the bill and the only relief sought, an order of dissolution is such a final order as can be appealed from. This is the view taken by the Supreme Court of Illinois.†

And this court have indicated a similar view.‡

If *Moses* v. *The Mayor*,§ have a contrary aspect, that case is distinguishable from this one. That case was an appeal from the judgment of a State Supreme Court revising and remanding the cause to the inferior State court. This is an appeal from a decree of the Circuit Court finally disposing of the merits of controversy. The motion to dissolve was upon an answer which raised only a question of law. Nothing thus remained to be done except formally to dismiss the case for want of equity.

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* Williams v. Bank of the United States, 11 Wheaton, 414.

† Titus v. Mabee, 25 Illinois, 257.

‡ Thompson v. Dean, 7 Wallace, 342; Railroad Co. v. Bradley, Ib. 575; Stoval v. Bank, 10 Id. 583.

§ 15 Wallace, 387.

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Opinion of the court.

The CHIEF JUSTICE delivered the opinion of the court.

It is first objected that this motion cannot be entertained now because the appellants had until the next term to file the record. In *Ex parte Russell*,* we decided that "unless some unforeseen inconvenience should arise from the practice, we would not refuse to hear a motion to dismiss before the term in which, in regular order, the record ought to be returned," if the record was actually brought here and printed. We think now, as we did then, that such a practice will "be likely to prevent great delays and expense and further the ends of justice."

It is next objected that the notice of the motion is insufficient, because it was not accompanied by a copy of the brief or argument to be used in its support, as required by the amendment to Rule 6, adopted at the December Term, 1871. This might have been a good cause for postponing the hearing to give time for further preparation, if application therefor had been made. Instead of that a full argument has been filed upon the merits of the motion. No more could be done if the hearing should be now postponed. Under these circumstances we are inclined to treat the filing of the argument as a waiver of the notice required by the rule.

It is next objected that all the parties defendant in the lower court are not parties to this motion to dismiss. The motion is made by the appellees and is signed by the attorney of the only defendant in the court below who had any real interest in the litigation, and the only one who filed an answer.

This brings us to the merits of the motion. We have many times decided that an appeal will not lie from a decree dissolving an injunction without dismissing the bill.†

In this case the bill was not dismissed. It may have been the intention of the court to dispose of the whole case by the

* 16 Wallace, 671.

† Young v. Grundy, 6 Cranch, 51; McCollum v. Eager, 2 Howard, 61; Hiriart v. Ballon, 9 Peters, 167; Moses v. The Mayor, 15 Wallace, 390.

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entry as made, but that intention is certainly not expressed. A motion was made to dissolve the injunction upon the bill and answer filed. It does not appear that the case was heard except upon this motion, and there is nothing in the record to show that it will not be still within the power of the Circuit Court upon the dismissal of the appeal to grant the complainants all the relief they ask. The case is still open on its merits. It is only the interlocutory order that has been disposed of.

APPEAL DISMISSED.

SANDUSKY v. NATIONAL BANK.

A petition addressed to the District Court "in bankruptcy sitting," by a person who has been decreed an involuntary bankrupt, "for a review of the record of the said proceedings in bankruptcy, and that the decree declaring the petitioner a bankrupt be set aside and vacated, and the petition of the petitioning creditor be dismissed and the petitioner's estate be restored to him; and for such other and further relief in the premises as may be equitable and just"—the orders and notices and every proceeding in the matter being entitled as in the original proceeding "in bankruptcy"—is but a petition filed in the original proceedings in bankruptcy; and is not a bill in equity to impeach the adjudication for fraud. It cannot be separated from the original proceedings and taken into the Circuit Court by appeal as a case in equity under the eighth section of the Bankrupt Act. If any action by the Circuit Court is wanted by the person decreed a bankrupt, he must obtain it under the second section of the Bankrupt Act, which gives a general supervisory jurisdiction to that court over the proceedings of the District Court, except where special provision is otherwise made. No special provision is made in such a case for review by the Circuit Court. From any decision by the Circuit Court, acting in its general supervisory jurisdiction conferred by the second section, no appeal or writ of error lies to this court.

ON motion by *Mr. W. T. Otto*, to dismiss, for want of jurisdiction, an appeal from the Circuit Court for the Southern District of Illinois; the case being thus:

By the Bankrupt Act it is thus in effect enacted:

"SECTION 1. That the several District Courts be . . . courts

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of bankruptcy, and shall have original jurisdiction in their respective districts in all matters and proceedings in bankruptcy. . . . And the jurisdiction shall extend to all cases and controversies arising between the bankrupt and any creditor who shall claim any debt or demand under the bankruptcy," &c.

"SECTION 2. That the several Circuit Courts . . . within and for the districts where the proceedings in bankruptcy shall be pending, shall have a *general superintendence and jurisdiction* of all cases and questions arising under this act; and *except where special provision is otherwise made*, may, upon *bill*, petition, or other proper process, of any party aggrieved, hear and determine the case [as] a court of equity.

"SECTION 8. That appeals may be taken from the District to the Circuit Courts in all *cases in equity*," &c.

In this state of statutory law, the First National Bank of Indianapolis, on the 25th of August, 1871, filed a petition in the District Court of the United States for the Southern District of Illinois, to have Harvey Sandusky adjudged a bankrupt. Sandusky appeared on the 5th September and, denying the allegations against him in the petition, demanded a trial by jury. This demand was afterwards withdrawn by his attorney, and, on the 30th January, 1872, he was in due form adjudged by the court a bankrupt. Afterwards an assignee, one J. G. English, was chosen and qualified, who proceeded with the settlement of the estate.

On the 9th December, 1873, Sandusky served upon the bank a notice, entitling it, "*In the matter of the petition of the First National Bank of Indianapolis* v. *Harvey Sandusky, in bankruptcy*," and giving to the bank notice that "on the 10th of December, 1873, at 10 o'clock A.M., before the Honorable S. H. Treat, judge of the said court, at chambers, he, said Harvey Sandusky, would move the court for leave to file his petition in the above-entitled cause, for a review of the proceedings in the said cause, and to vacate the decree of bankruptcy therein, and for other relief, which petition" the notice stated that "the said Sandusky had on that day placed in the hands and in the office of the clerk of said court for the examination of the bank and of its attorneys."

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Argument in support of the motion to dismiss.

On the 10th December an entry was made in the cause, reciting that on that day, before the Honorable S. H. Treat, judge, "*In the matter of Harvey Sandusky*, bankrupt, *in bankruptcy*, came the said Harvey, by his counsel, and the petitioning creditor, The First National Bank of Indianapolis, and J. G. English, the assignee, by their counsel, and that on motion of the said Harvey leave was given him to file his petition herein, which was accordingly done; and that on his further motion it was ordered by the court that the said First National Bank of Indianapolis and J. G. English file their answers to said petition on or before the first Monday of January next."

The petition was addressed to the court "in *bankruptcy* sitting," and prayed "for a review of the record of the said proceedings in *bankruptcy;* that the decree declaring the petitioner a bankrupt be set aside and vacated, and the amended and original petition of the said bank be dismissed, and that the petitioner's estate be restored to him; and for such other and further relief in the premises as may be equitable and just."

No defendants were named in the petition, and there was no prayer for process.

An answer was filed by the bank, and also by G. W. Parker, who acted as the agent of the bank in the original proceedings. The assignee did not answer. Testimony was taken, and on the 12th June, 1874, after full hearing, the petition was dismissed. Sandusky then prayed an appeal to the Circuit Court, which was allowed, and on 25th June that court affirmed the judgment of the District Court. He then appealed to this court. It was this appeal which it was now moved to dismiss for want of jurisdiction.

Mr. William Tod Otto, in support of his motion, argued that the supervisory jurisdiction vested in the Circuit Court of the United States, by the first clause of the second section of the Bankrupt Act, had been fully considered by this court and its exemption from any appellate control determined in

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several well-known cases;* that these cases decide that from a decree of the Circuit Court, rendered in exercising such jurisdiction, no appeal lies to this court; that such jurisdiction, by the terms of that clause, extends to "all cases and questions arising under the act, except when special provision is otherwise made;" and that no special provision is made for any appellate jurisdiction over the finding and decision of a District Court on a petition in involuntary bankruptcy.

Mr. J. Harper, contra, argued that the petition of Sandusky "for a review of the proceedings" in his cause and to vacate the decree of bankruptcy therein, "and for other relief," gave to the petition the character of a "bill of review," and made a "case in equity;" that such a case when taken into the Circuit Court was taken there under the eighth section of the Bankrupt Act, giving an "appeal" from the District to the Circuit Court, and not under the second section, which gave to the Circuit Court a general revisory jurisdiction over the District Court, under which section, confessedly by all, no appeal would lie; just as if, on the other hand, the case was in the Circuit Court under the eighth section, and as a "case in equity," an appeal confessedly of all would lie to this court under the act of Congress of 1803,† which enacts that "from all final decrees in equity rendered in any Circuit Court in any cases of equity" . . . jurisdiction shall exist to review them.

The CHIEF JUSTICE delivered the opinion of the court.

To authorize an appeal to this court from the judgment or decree of a Circuit Court reviewing the action of a District Court under its bankruptcy jurisdiction, the case must be one in which an appeal may be taken from the District to the Circuit Court; that is to say, it must be a case in equity arising under or authorized by the Bankrupt Act.‡

In our opinion this is not such a case. A proceeding in bankruptcy from the time of its commencement, by the

* See them cited, *infra*, p. 298, by the court.—REP.

† 2 Stat. at Large, 244.

‡ Revised Statutes, § 4980.

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filing of a petition to obtain the benefit of the act, until the final settlement of the estate of the bankrupt, is but one suit. The District Court, for all the purposes of its bankruptcy jurisdiction, is always open. It has no separate terms. Its proceedings in any pending suit are, therefore, at all times open for re-examination upon application therefor in an appropriate form. Any order made in the progress of the cause may be subsequently set aside and vacated upon proper showing made, provided rights have not become vested under it which will be disturbed by its vacation.

Applications for such re-examination may be made by motion or petition, according to the circumstances of the case. Such a motion or petition will not have the effect of a new suit, but of a proceeding in the old one.

In this case Sandusky had been adjudged a bankrupt in a suit to which he was a party. He desired to have that adjudication set aside, and accordingly filed his petition in the District Court for that purpose. This petition was filed in the original cause. It was in no sense whatever a bill in equity to impeach the adjudication for fraud. It had none of the forms of such a bill. On the contrary, it had all the forms of a petition for a rehearing in the original suit, and at the express request of Sandusky was filed as a petition in that suit. It thus became part of the proceedings in bankruptcy, from which it cannot be separated. No appeal could be taken from the whole proceeding, and consequently none can be taken from this as one of its parts. The only remedy provided for the correction of errors in such cases is to be found in the supervisory jurisdiction of the Circuit Courts under the provisions of the first clause of the second section of the Bankrupt Act.* From the decisions of the Circuit Court in the exercise of that jurisdiction no appeal lies to this court. It has been many times so decided.†

APPEAL DISMISSED.

* Revised Statutes, § 4976.

† Morgan v. Thornhill, 11 Wallace, 65; Hall v. Allen, 12 Id. 454; Mead v. Thompson, 15 Id. 688; Marshall v. Knox, 16 Id. 555; Coit v. Robinson, 19 Id. 285; Stickney v. Wilt, *supra*, 150.

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GREGORY v. MCVEIGH.

1. Where, by the laws of a State, an appeal can be taken from an inferior court of the State to the highest court of the same, only with leave of this latter or of a judge thereof, and that leave has been refused in any particular case, in the regular order of proceeding—the refusal not being the subject of appeal to this court—a writ of error, if there be in the case a "Federal question," properly lies, under section 709 of the Revised Statutes, to the inferior court, and not to the highest one.
2. A Federal question exists when—in a suit by a person who seeks to recover property on the ground that a judgment and execution on it by a court of the United States, interpreting a statute of the United States, has deprived him of the property in violation of the first principles of law—the defendant sets up a title under that judgment and execution, and the decision is against the title so set up.

ON motion to dismiss, for want of jurisdiction, a writ of error to *the Corporation Court of Alexandria*, Virginia.

The case was thus:

Towards the close of the late rebellion, the United States filed a libel of information, under the act of 17th July, 1862, "to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes"—the act commonly known as "the Confiscation Act"—against certain real estate in Alexandria, Virginia, a State then within the government lines, belonging to one McVeigh, a person then in the rebel lines, to confiscate it.

This act authorized a seizure by the President, of the property in the then loyal States of any person giving aid and comfort to the rebellion, and directed that after the property had been seized, proceedings *in rem* should be instituted in any District Court of the United States, "which proceedings," said the act, "shall conform as nearly as may be to proceedings in admiralty *or revenue cases*." The act further directed that if, on such proceedings had, the property, whether real or personal, should be found to belong to a person giving aid and comfort to the rebellion, the same should be condemned "as enemies' property," and become

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the property of the United States, and be disposed of as the court should direct.

This "Confiscation Act" was the subject of interpretation by this court in several cases which arose in December Term, 1867,* and in which it was adjudged that where the proceedings under the act relate to a seizure of *land*, they present a case of common-law jurisdiction, and are to be conformed in respect to trial by jury to the course of the common law.

In the particular proceedings now before the court, that is to say, the proceedings against McVeigh's land, McVeigh appeared by attorney, interposed a claim to the property, and filed an answer. The District Attorney of the United States submitted a motion that the appearance, answer, and claim should be stricken from the records, for the reason that the respondent was a resident of a place specified, within the Confederate lines, and a rebel. The court (Underwood, J.) granted this motion. A decree *pro confesso* was subsequently entered, the life interest of McVeigh in the property condemned and ordered to be sold, and sold accordingly; one Gregory being the purchaser. McVeigh then brought the case on error to this court; it is reported in 11th Wallace, page 267. The court, by Swayne, J., then said:

"The District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum. If assailed there he could defend there. The liability and the right are inseparable. A different result would be a blot upon our jurisprudence and our civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice."

This court accordingly reversed the judgment, and remanded the case with directions to proceed "in conformity to law."

* Union Insurance Company v. United States, Armstrong's Foundry, and United States v. Hart, 6 Wallace, 759, 766, 770.

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Statement of the case.

With this judgment and opinion in his hand, McVeigh now brought ejectment against Gregory, the purchaser, in the Corporation Court of Alexandria, which was the proper court to sue in, to recover the lands in which his life estate had been sold, under the decree in the proceedings under the Confiscation Act.

On the trial the defendant set up the purchase made under the decree in the suit in confiscation, and requested the court to charge that the decree of condemnation divested McVeigh of his life estate. The court refused so to charge, and, contrariwise, charged that

"The sentence of condemnation was void, and the plaintiff was not divested of any part of his title in the premises by reason of the sentence, sale, and deed of the marshal, because the answer, claim, and appearance of McVeigh were struck from the files by the court before the decree was entered, and the said McVeigh was thus denied a hearing, and his property condemned without any opportunity of defence on his part."

The defendant excepted to this charge.

Judgment was rendered, of course, in favor of McVeigh, the plaintiff.

The defendant then addressed a petition to the different *judges* of the Supreme Court of Appeals, of Virginia, praying for a writ of error and supersedeas to the said judgment. The petition was not to the court in its corporate capacity.

The provisions of statute in Virginia* on this subject of writ of error, &c., to the court just named are as follows:

When and in what case petition for appeal may be presented, time excluded from the computation.

"SECTION 2. Any person who thinks himself aggrieved by an order in a controversy concerning the . . . possession of title of property to be changed, or adjudicating the principles of a cause, or to any civil case wherein there is a final judgment, decree, or order, may present a petition . . . for a writ of error or supersedeas to the judgment or order."

* Code of Virginia, 1873, Chap. 178.

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Record exhibited with petition; how it is made up; what shall not be copied.

"SECTION 5. With such petition there shall be a transcript of the record, of so much of the case wherein the judgment, decree, or order is, as will enable the court or judge to whom the petition is to be presented properly to decide on such petition, and to enable the court, if the petition be granted, properly to decide the questions that may arise before it."

To whom presented.

"SECTION 9. The petition may be presented to the *court* wherein the case is to be docketed if the writ of error or supersedeas be allowed, or to a *judge* thereof, or, if the judgment, decree, or order be of a county court, to any circuit judge."

When petition to be rejected, and when rejection final.

"SECTION 10. . . . . In a case wherein the court or judge to whom a petition is duly presented shall deem the judgment, decree, or order plainly right, and reject it on that ground, if the order of rejection so state, no other petition shall afterwards be presented to the same purpose."

The judges of the Supreme Court of Appeals deeming the judgment complained of to be "plainly right," each and all rejected the petition and refused to grant any writ of error or supersedeas.

This was, therefore, the end to all further proceedings in appeal in the courts of the State.

The defendant now got a writ of error from this court to *the Corporation Court of Alexandria*, assuming the case to come within section 709 of the Revised Statutes (the 25th section of the old Judiciary Act), which enacts that—

"A final judgment or decree in any suit in *the highest court of the State in which a decision in the suit could be had*, where is drawn in question the validity of a treaty or statute of, *an authority exercised under the United States*, and the decision is against its validity . . . may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error."

The Corporation Court of Virginia is not the highest court

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of the State of Virginia. That court is the Supreme Court of Appeals.

Mr. P. Phillips, in support of the motion to dismiss for want of jurisdiction:

We place this motion on two grounds:

1st. That the Corporation Court, to which the writ of error was directed, was not the highest court of the State in which the decision on the case could be had.

2d. That the charge given by the judge—to wit, that the confiscation proceedings did not divest McVeigh of his title, on the ground that he had been refused a hearing and his answer stricken from the files—did not involve a "Federal question;" in other words, that such proceedings did not show "an authority exercised under the United States."

1st. *The court was not the highest court of the State in which a decision could be had.*

The statute of Virginia enacts that when the court or *judge* to whom the petition is presented shall deem the judgment plainly right and reject it on that ground, if the order of rejection so state it, no other petition shall afterwards be presented. The defendant in the present case, having the right to present a petition for the writ of error to the Court of Appeals, or to the judge, has adopted the latter mode. His application was rejected not by the Court of Appeals, but by "*all the judges.*"

The appellate jurisdiction of this court is exercised only by virtue of section 709 of the Revised Statutes (the old 25th section of the Judiciary Act), and that confines it to the revision of the judgment of the highest court of the State in which the decision could be had.

The question then is, was the Corporation Court the highest court in the State in which the decision could be had?

The appellant maintains the affirmative, because he says that he applied to all the judges of the highest court for the writ of error, and that they refused it.

If he had made his application to the court itself, and had had an order rejecting the application, this rejection

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Argument against the jurisdiction in this court.

would have constituted an affirmance of the judgment below. In other words, it would have been the decision of the highest court of the State that the judgment was plainly right. The writ of error would then, confessedly we suppose, have been only directed to review the judgment of the Court of Appeals. The statute of Virginia requires the petition to be accompanied by the transcript, an assignment of error, and notice to the opposite party. The cause is thus fully before the Court of Appeals, on the showing made by the petitioner, and the decision of the court is as final and complete, as it could have been if the cause had been docketed and regularly argued.

But this is not an open question.

In *The Richmond Railroad Company* v. *The Louisa Railroad Company*,* where the petition for appeal was directed to the Court of Appeals of Virgina, the appellee contended that this court had no jurisdiction of the cause, because the highest court of the State had not rendered a *final judgment*, and that its refusal to allow the application for the appeal was *not an affirmance of the judgment below.*

But this court briefly disposed of the position by saying,

"The decree having been affirmed by the Court of Appeals, by *their refusal to entertain an appeal*, there can be no doubt of the jurisdiction of this court to review the decision of the State court."

In *Bigelow* v. *Forrest*,† the writ was directed to the Court of Appeals, and in this as in the preceding case, the Court of Appeals had merely rejected the petition for the writ of error. This court says:

"There is no ground of complaint that the Supreme Court of Appeals denied the supersedeas to the judgment below."

It is, therefore, clear that in the case now under consideration, the Court of Appeals was the highest court in the State, and that that court had jurisdiction of the judgment complained of.

* 18 Howard, 80. † 9 Wallace, 847.

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If *that* jurisdiction has not been invoked by the plaintiffs in error, they have no right to say that the Corporation Court is the highest court in which the decision could be had.

It is shown by their own averment that they have not invoked the jurisdiction of that court as they might have done, but have made their application for the writ to the *judges*.

If the action of all the judges in refusing the writ is in legal effect the same thing as the refusal by the court, then the court has acted, and, on the authority of the cases cited, the writ of this court must be directed to the Court of Appeals.

If it is not the same, but a different thing, then having the power to invoke the action of the highest court, and having failed to do so, the revisory jurisdiction of this court cannot be extended over the judgment of an inferior court of the State.

Where, indeed, by the law of the State limiting the appeal or writ of error, the judgment of the inferior court is of such an amount or of such a character as not to be subject to the revisory power of the appellate tribunal, such inferior court, *ex vi termini*, is the highest court of the State in which the decision could be had, and then the writ in this court is properly directed to that court. Such was the case of *Downham* v. *Alexandria*,* where the writ was directed to the Fourth Judicial Court of the State of Virginia, "in which a judgment of the Corporation Court of Alexandria for $200 was affirmed." The writ in that case was sustained, because by act of the State no appeal was allowed from the judgments of said District Court where the matter in controversy did not exceed $1000.

2d. *There is no Federal question.*

The writ of this court can only bring up for review the judgment of a State court "where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States."

* 9 Wallace, 659.

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Argument against the jurisdiction in this court.

Now, Judge Underwood was a judge of the District Court. His powers as judge are specified by statute. His judgment within the limits of his prescribed jurisdiction are conclusive, until reversed by direct proceedings for this purpose. They are then to be regarded as "authority exercised under the United States," and cannot be attacked collaterally. But if this judge render a judgment against a person, or on a subject over which the law has conferred *no jurisdiction*, such a judgment is a nullity, and if presented in another court as a defence, its rejection would not be a denial of "an authority exercised under the United States."

Suppose a record from a Circuit Court of the United States, showing a judgment and sale to be given in evidence, and on inspection it were seen that the declaration averred that the plaintiff and defendant were citizens of the same State. Or that it appeared the judgment was by default, and without either service on defendant or any appearance for him. In neither case would such a proceeding show any "authority exercised under the United States," but on the contrary an exercise of power exercised in violation of its authority.

Now, this particular decree of condemnation made by Underwood, J., was made under the act of 1862, which authorizes the confiscation of property when its owner had been guilty of a certain prescribed offence. The property was not offending; but it was subject to condemnation when the owner was proven to be guilty. On the trial the question of guilt is to be submitted, under the statute, as it has been interpreted by this court—that is to say, under the statute rightly read—to a jury. The party offending is to receive notice, and is entitled to be heard. McVeigh did receive notice and filed his answer, but Underwood, J., refused him a hearing and struck his answer from the files, and then rendered a decree *pro confesso*. Was this the exercise of "an authority under the United States?" Is such a judgment merely erroneous, or is it an absolute nullity? If the former, then we admit that in its rejection by the State court a Federal question is involved. But if, as we main-

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tain, it was an absolute nullity, its rejection does not involve such a question; for a proceeding which is an absolute nullity cannot be said to be "an authority exercised under the United States."

This action of Underwood, J., has been passed upon by this court in the case of *Mc Veigh* v. *United States*, in which it is said that the striking from the files the answer of McVeigh if sustained, "would be a blot upon our jurisprudence and civilization, and contrary to the first principles of the social compact and of the right administration of justice."

No stronger language could be well used to show that these proceedings were absolutely null.

The Corporation Court had before it that decision when this case was tried. In charging that the proceedings offered in evidence did not divest McVeigh of his title, did the court deny the validity of "an authority exercised under the United States?" If the decree of condemnation was, as we have asserted, a nullity, the answer must be in the negative. There must be, say this court in *Millingar* v. *Hartupee*,* something more than a bare assertion of such an authority to give jurisdiction under section 709. This court in the case cited thus declares:

"The authority intended by the act is one having a real existence derived from competent governmental power. If a different construction had been intended Congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against *claims of authority under the United States.*"

Mr. S. F. Beach, contra:

1. The power of the State courts to correct error in the judgments, if error there was, had been wholly exhausted before the writ of error from this court was applied for. There was no higher court of the State to which the case could be taken for decision. Such being the fact, it matters not how low down in the grade of State courts the judgment may

* 6 Wallace, 261.

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have been left. A writ of error will lie to it from this court as much as if it had been made by the highest court in the State; for, of course, the writ must be directed to the court in which the record of the judgment is. No other court could make return to a writ.

It is argued against us that the petition, instead of being presented to the *judges* of the Court of Appeals, might have been presented to the *court* itself, and it is said that their refusal in such case by the court would have been an affirmance of the judgment below, and thus that the decision of the case might have been had in the Court of Appeals.

It by no means follows (if the point were a material one) that such rejection by the court is identical with an affirmance of the judgment below. That the two are "exactly equivalent" in practical effect may be admitted, but things may be exactly equivalent in practical effect and yet very dissimilar in themselves.

Nor does the case of *The Richmond Railroad Company* v. *The Louisa Railroad Company* establish that a refusal by the court to allow the writ is a formal affirmance of the judgment below. In that case the manner of directing the writ was not a question raised or considered by this court. It considered the larger question, whether the power of the State courts had been exhausted so as to give jurisdiction to this court, and the decision of that question did not necessitate an inquiry into the proper manner of directing the writ. What was said by the judge giving the opinion was *dictum* merely.

The Court of Appeals never enters a judgment of affirmance or reversal, except upon a writ of error or supersedeas, issued, executed, and returned. Until then no case finds place upon its docket.

But, suppose that refusal by the court to allow a writ *is* identical in law with a formal affirmance, what follows? Clearly that if the petition had been presented to and refused by the *court* instead of having been presented to and refused by the *judges*, the writ of error should have been directed to the Court of Appeals, and not to the Corporation

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Argument in support of the jurisdiction in this court.

Court; and that is *all* which follows, unless, indeed, the converse may also be said to follow, to wit, that inasmuch as the petition was not so presented and refused, the writ is not improperly directed, when directed to the Corporation Court.

It does not matter *by what method* the power of the State courts has been exhausted. This court concerns itself only about the *fact*, and if the *fact* appears, the manner in which it has been accomplished is immaterial. It is not denied that we have pursued a method provided by law, and the adoption of which barred us from resort to any other method, and if the test of jurisdiction here be as we assert, the *fact*—not the *method*—of the exhaustion of the power of the State courts—not the grade of the court in which the judgment happens to be left when the point of exhaustion is reached—then the argument against us is not well made.

Unless exercised in this way this court cannot, in cases where the practice in matters of appeal is such as exists in Virginia, exercise jurisdiction at all. There is no other court to which the writ could be directed. If the writ, therefore, be dismissed because directed to the Corporation Court, we have a case where a claim of right under Federal law has been denied by a State court—where the party asserting it has exhausted the power of the State courts to reverse the decision—and yet the validity of the claim cannot be passed upon by a Federal court.

2. *A Federal question is involved.*

The action was an action of ejectment, in which the plaintiff in error was defendant. On the trial the defendant proved and offered in evidence the marshal's deed and the record of the sentence of condemnation by which the plaintiff's life estate in the property had been condemned as forfeited to the United States, and prayed the court on that evidence to rule that the plaintiff's life estate was thereby divested. The court refused the prayer. The defendant therefore claimed a right under the statute of the United States, and the decision of the court was adverse to the claim.

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Whether that decision was correct or erroneous is not a question material *to this motion*, the appellate *jurisdiction* of this court not depending upon whether the State court decided the question correctly, but upon whether it decided the question *adversely* to the party raising it.

The distinction between the cases now before the court and the case of *Millingar* v. *Hartupee* is obvious.

In the latter case jurisdiction in this court was claimed, because of a right asserted under "an authority" of the United States, and there existed no "authority" of the United States under which any such right could be asserted. The jurisdiction was therefore denied, the court saying:

"In respect to the question we are now considering, 'authority' stands upon the same footing with 'treaty' or 'statute.' If a right were claimed under a treaty or statute, and on looking into the record it should appear that no such treaty or statute existed or was in force, it would hardly be insisted that this court could review the decision of a State court, that the right claimed did not exist."

There is no question in the present case as to the existence of the "statute" under which the plaintiffs in error claimed their right, or as to the *fact* of the rendering of the judgment by the District Court and of the marshal's sale and conveyance. The only matter with respect to which a question is made is the legal validity of the judgment, and that is not a question proper to be discussed under this motion.

It is perhaps proper, however, to say that our general proposition in respect to the judgment is, that whilst it may have been or clearly was *erroneous* it was not *void;* that the court which rendered it had jurisdiction to render it, and if so, that a sale made under it carried a valid title to the purchasers.

The CHIEF JUSTICE delivered the opinion of the court.

The motion to dismiss this cause for want of jurisdiction is denied.

"A final judgment or decree in any suit, in the highest

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court of a State in which a decision in the suit could be had," may in a proper case be re-examined in this court.*

The Court of Appeals is the highest court in the State of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and then can only examine the judgment of that court. If, however, the suit is one of which that court cannot take jurisdiction, we may re-examine the judgment of the highest court which, under laws of the State, could decide it.†

The Court of Appeals has revisory jurisdiction over the judgments of the Corporation Court of the city of Alexandria, but parties are not permitted, in the class of cases to which this belongs, to take such judgments there for review as a matter of right. Leave for that purpose must first be obtained. Two modes of obtaining this leave are provided. One by petition to the Court of Appeals itself, and the other by petition to a judge thereof. If the petition is presented to a judge and he denies it generally, without more, it may be again presented to the court. But if the judge to whom the application is made "shall deem the judgment, &c., plainly right," and reject it on that ground, if the order of rejection shall so state, no other petition shall afterwards be presented to the same purpose.‡ The parties are left free to present their petitions to the court or to a judge thereof, as they may find it most convenient or desirable.

It has long been settled that if a cause cannot be taken to the highest court of a State, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court.§

In the present case the Court of Appeals has now no power to review the judgment of the court below. It can-

* Revised Statutes, § 709.

† Downham v. Alexandria, 9 Wallace, 659.

‡ Code of Virginia, 1873, chapter 178, § 10.

§ Railroad Co. v. Railroad Co., 18 Howard, 80.

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not even entertain a motion for leave to proceed. A judgment has been rendered by the highest court of the State in which a decision can be had. The Court of Appeals has never, in fact, had jurisdiction. A suit cannot be taken there, except upon leave, and that leave has, in the regular order of proceeding, been refused in this case. From this refusal there can be no appeal. Everything has been done that can be to effect the transfer of the cause. The rejection of a petition by one judge does not prevent its presentation to another. Here the petition has been presented to each and every one of the judges, and they have all rejected it because the judgment was "plainly right." Thus the doors of the Court of Appeals have been forever closed against the suit; not through neglect, but in the regular order of proceeding under the law governing the practice.

We think, therefore, that the judgment of the Corporation Court of the city of Alexandria is the judgment of the highest court of the State in which a decision of the suit could be had, and that we may re-examine it upon error.

Without stopping to discuss the other question presented by the motion, it is sufficient to say that we think the case involves the consideration of a Federal question. The proceeding in the District Court was under the authority of the United States, and its validity is drawn in question.

MOTION DENIED.

BLAKE v. NATIONAL BANKS.

1. Under the Internal Revenue Act of July, 1870, which enacts that "there shall be levied and collected *for and during the year* 1871, a tax of 2½ per cent. on the amount of all interest paid by corporations, and on the amount of dividends of earnings *hereafter* declared by them," and which directs that such interest and dividends shall not after the 1st of August, 1870, be taxed under prior acts; interest paid and dividends declared during the last five months of the year 1870, are taxable, as well as those declared during the year 1871, it appearing that income of other

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Statement of the case.—Statutory history and enactments.

sorts was meant to be so taxed, and there being no apparent reason why income derived through corporations should not be taxed like income generally.

2. A badly expressed and apparently contradictory enactment (such as the one above mentioned) interpreted by a reference to the Journals of Congress, where it appeared that the peculiar phraseology was the result of an amendment introduced without due reference to language in the original bill.

ERROR to the Circuit Court for the Southern District of New York, in which court several National banks sued Blake, a collector of internal revenue, to recover certain taxes of 2½ per cent., upon dividends which had been declared and made payable by the banks, during the last five months of the year 1870; which taxes Blake as collector had demanded, and which the banks had paid on compulsion and under protest.

There were other cases from other circuits, including one from the Eastern District of Pennsylvania, heard with these, involving the same question, and also the question whether additions to surplus and payments of interest made by corporations during the five months above mentioned, that is to say, during the months of August, September, October, November, or December, 1870, were liable to be charged with the said tax.

The case depended upon certain statutes, and was thus:

The 118th, 119th, 120th, 121st, and 122d sections of an act of June 30th, 1864, laid a tax of 5 per cent. on income; the tax commonly known as the "income tax."*

So far as the income which was enjoyed by any one was *not* obtained from dividends made by corporations, or from interest on their bonds or other securities, or from additions to the surplus, contingent, or other funds of such corporations, individuals, by the 118th and 119th sections of the act, were to make it known by return to the assessor, and were *themselves* to pay it directly to the collector. The tax thus payable directly by individuals was to be levied on the

* 13 Stat. at Large, 288.

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first day of May in each year (on the gains, of course, of the preceding year), and be payable on or before the 30th of June following; and it was enacted that it should be levied until the year 1870 and no longer than until that year; that is to say, that this tax of 5 per cent. should end with and in the year 1869.

So far as income came from dividends made by corporations or additions by the corporations to the surplus, contingent or other fund of undistributed earnings, or by the interest payable on bonds, &c., of corporations, the matter was regulated by the 120th, 121st, 122d, and 123d sections.

The 122d section—which imposed a duty of 5 per cent. upon interest on bonds issued, on dividends declared, and on undistributed profits earned by railroad and other corporations—made it the duty of the officers of said corporations to return to the assessor and pay to the commissioner the tax within thirty days after the said interest and dividends became due and payable, and they were authorized to *retain* the tax so paid, out of the interest and dividends due to bond and stockholders.

This act of June 30th, 1864, was the only act, prior to July, 1870, which imposed a tax on interest and dividends payable by railroad companies.

In this condition of things—that is to say, with an income tax law in 1864, which extended to and included the year 1869, but no later years—Congress, on the 14th July, 1870, passed a new act. This new act of July 14th, 1870, was entitled "An act to reduce internal taxes, and for other purposes;" and in certain sections not now under consideration, taxation was reduced.

The sections with which the present case was immediately concerned, were the sixth, the seventh, the fifteenth, and the seventeenth; and they were in substance as follows:

"SECTION 6. There shall be levied and collected *annually*, as hereinafter provided, for the years 1870 *and* 1871, and no longer, a tax of 2½ per centum upon the gains, profits, and income of every person residing in the United States, and of every citizen of the United States residing abroad, derived from any source

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whatever, whether within or without the United States, except as hereinafter provided."*

"SECTION 7. In estimating the gains, profits, and income of any person, there shall be included all income derived from . . . the gains, profits, and income of any business, profession, trade, employment, office, or vocation, including any amount received as salary or pay for services in the civil, military, naval, or other service of the United States, or as senator, representative, or delegate in Congress, except that portion thereof from which, under authority of acts of Congress previous hereto, a tax of 5 per centum shall have been withheld."

"SECTION 15. There shall be levied and collected *for and during the year* 1871, a tax of 2½ per centum on the amount of all interest or coupons paid on bonds or other evidences of debt issued and payable in one or more years after date, by any of the corporations in this section hereinafter enumerated, and on the amount of all dividends of earnings, income, or gains *hereafter declared* by any bank, . . . railroad company, &c., whenever and wherever the same shall be payable, and to whatsoever person the same may be due; and on all undivided profits of any such corporation, which have accrued and been earned and added to any surplus, contingent, or other fund. And every such corporation having paid the tax as aforesaid is hereby authorized to deduct and withhold from any payment on account of interest, coupons, and dividends, an amount equal to the tax of 2½ per centum on the same."

The sixteenth section provided that an account should be rendered by the corporation making a dividend, &c., to the assessor on or before the tenth day of the month following the dividend of the amount of income and of profits and of taxes as aforesaid, and that the amount payable as tax should be paid within thirty days after it became due.

The next section was thus:

"SECTION 17. Sections 120, 121, 122, and 123 of the act of June 30th, 1864, &c., shall be construed to impose the taxes therein mentioned to the 1st day of August, 1870; but after that date no further taxes shall be levied or assessed under said sections," &c.

* 16 Stat. at Large, 257.

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The difficulty now arose upon the peculiar phraseology of the above-quoted fifteenth section as indicated by the italicized words: "There shall be levied and collected *for and during the year* 1871, a tax of 2½ per centum, on the amount of all . . . dividends *hereafter* declared." The act was passed July 14th, 1870. Suppose now that a dividend was made between that date and January 1st, 1871. It was declared "after" the passage of the act, and the act enacted that the tax was to be on all dividends "thereafter declared." But it also enacted that the tax was to be levied for and during the year 1871, and the dividend was not made for that year.

And the seventeenth section of the act enacted that no tax should be levied longer under the sections 120, 121, 122, or 123 (the sections affecting corporations) of the act of 1864.

Only two constructions seemed possible:

One of them would hold that the thing to be done in 1871 was the "levying and collecting." This would make the meaning thus: "A tax of 2½ per cent. on the amount of all dividends hereafter declared shall be levied and collected in the year 1871." This was the view of the meaning of the act taken by the government. It asserted that the limitation to the year 1871 did not apply to the accruing or to the declaring of the dividend to be taxed, but only to the time when the tax was to be levied and collected, and that the words "hereafter declared" showed that the tax was to be levied on all dividends declared after the passage of the act, and therefore that a dividend declared in December, 1870, being "hereafter declared," must pay the tax, though the levying and collecting was to be postponed till 1871.

The other construction was that the words "for and during the year 1871" apply to, and limited, and were intended to describe, the time of the earning of the money out of which the dividends were declared, and also the time of the declaration of the dividends; that is to say, that dividends were not to be taxed unless they were either declared in 1871, or the moneys from which they were declared were

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earned in that year, and that the object of the section was to tax only dividends declared or earned therein.

On the part of the government it was said, "Income is equally income, and, in practical view, identically the same thing, whether it be interest coming from an individual debtor or interest coming from a railroad company; whether it be a dividend of profits declared to one of a mercantile firm having several partners, or a like dividend declared to one of several stockholders of a bank or railroad or other corporation specified in the fifteenth section of the act of 1870. Why would you seek to tax the income from the first source and not to tax that from the second? In so acting you would make us give up and abandon for five months the less odious form of taxation, since it is less odious to let the corporation retain the tax and pay it for the citizen—in which case vast numbers of persons never so much as know that they have been taxed—and you would make us retain and enforce the more odious form, since it is more odious to make the citizen report, by an inquisitorial process, what gain has come directly into his hands, and then make him unclench his hand and give up what, from his mere possession of it, he had almost felt was his own. In so acting you would make us do worse, for you would make us put the burden of taxes on the poorer sorts of persons in every class (since the gains of these are generally made directly by themselves); and you would make us absolve, for five months, those whose gains come from the bonds and stocks of corporations, that is to say, the rich alone or chiefly."

To all this the reply of the banks, railroad, and other corporations was: We do not presume to be wiser than Congress, or to speculate upon the reasons for what it has done. Command being plain, our duty is obedience. And when in regard to income paid directly Congress says—

"There shall be levied and collected *annually* . . . for the years 1870 AND 1871, and no longer, a tax of 2½ per centum," &c.;

and in regard to income retained by and paid through corporations, says:

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"There shall be levied and collected for and during the year 1871, a tax of 2½ per centum," &c.;

We think it plain that Congress did not mean to lay a tax in the two cases for the same term of time.

This was the view taken by the banks, and in accordance with it they construed the section as though it read "a tax of 2½ per cent. shall be levied and collected on the amount of all dividends hereafter declared for and during the year 1871."

The Circuit Courts, where the question arose, sustained the position taken by the banks. That position was thus forcibly defended by McKennan, J., in the Pennsylvania Circuit:

"The seventeenth section of the act of July 14th, 1870, repeals the 122d and other sections of the act of 1864, by providing that, after the first day of August, 1870, no further taxes shall be levied or assessed under them. It is plain, therefore, that the tax complained of by the banks could not be assessed and collected under the act of 1864, and that unless it was authorized by the act of 1870, there is no warrant anywhere for its assessment. The fifteenth section of the latter act is the only part of it for which this effect can be asserted.

"The word 'levied' in the beginning of the section, is evidently employed as convertible with assessed or imposed, so that the import of the enactment is, that interest, dividends, and surplus earnings shall be subjected to a tax of 2½ per cent. for and during the year 1871. The plainly expressed meaning of the section would, therefore, seem to be, that the tax to be levied was a tax for the year 1871, and not for the whole or any part of any previous year, and that it was to be imposed upon the enumerated subjects during and within the year 1871, and not during or within any other year. Interpreting the words of the section then, according to their ordinary sense, interest falling due and dividends declared and payable within the last five months of 1870, were excluded from the operation of the tax.

"But it is urged that the phrase 'hereafter declared,' applied to dividends subject to the tax, dividends declared and payable before 1871. There is certainly no ground, either in the import

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of these words or in their collocation in the law, for extending their qualifying effect to interest or undivided profits. Only dividends are properly spoken of as 'declared;' not so either interest or undivided earnings, and to apply the term to them would be both inappropriate and unmeaning. It must be taken as referring exclusively to dividends; and interest and undivided earnings must be considered as affected by the unqualified import of the clause which makes them taxable for and during the year 1871.

"Nor is there any better reason for interpreting this phrase to describe only dividends declared after August 1st, 1870. It is not found in the same section with that date, and while, *ex vi termini*, it applies to the date of the passage of the act, this obvious reference cannot be changed by the exigencies of a mere arbitrary construction.

"But were these words used in any other sense than as referring to a period occurring after the passage of the act, and for and during the year 1871, as they naturally import, and not with intent to impose a tax upon dividends exceptionally? To preserve the congruity of legislative action and to harmonize the several sections of the act of 1870 itself, they must be thus interpreted.

"From the origin of the system of internal revenue taxation, through the whole course of legislation on the subject, interest on corporate indebtedness, dividends of profits, and undivided earnings were treated as closely related if not inseparable subjects of taxation. They were associated in the same section, the same tax was imposed upon them, and the same mode provided for its return and collection; and this relation was preserved in their relief together from the 5 per cent. tax, by the repeal of the 122d section of the act of 1864. They are, indeed, but a single subject, because they are the product of the inseparable exercise of corporate franchises, and are only nominally distinguishable by being set apart for different classes of recipients. They were, therefore, uniformly dealt with as cognate subjects of taxation. Now, to hold that dividends were intended to be taxed, and that interest and undivided profits were not, ought to be the result of an unequivocal declaration of Congress to that effect. Aside from this there is no reason for such a conclusion by construction. But if anything in the act is plain, it is that the tax upon interest and undivided profits

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was limited in its operation to the 1st of August, 1870, and that the new tax was not to be imposed upon them during the remainder of that year or until the year 1871. Now the same limitation is expressly applicable to the taxation of dividends, and the new tax to be levied upon them is also declared to be for the year 1871. A discriminating construction, by which they would be subjected to the new tax before 1871, would then not only disregard the analogies of former legislation, but it would necessarily characterize a tax, expressly declared to be 'for and during the year 1871,' as a tax for and during five months of the year 1870.

"The sixteenth section of the act of 1870 directs the mode and time of making a return of the income and profits subject to taxation under the fifteenth section. It requires a return to be made to the assessor of the district or his assistant, 'of the amount of income, and profits, and taxes as aforesaid . . . on or before the tenth day of the month following that in which any dividends or sums of money became due or payable as aforesaid,' and the act of July 13th, 1866, section eleven, requires the payment of the tax on or before the last day of the month. Under these provisions it is the obvious duty of corporations to return the dividends and sums of money due by them, and to pay the tax to which they are liable within the periods designated. If they are not bound to do so, it can only be for the reason that the dividends declared and the sums due by them are not subject to taxation. Now the tax imposed by the fifteenth section was not to be 'levied or collected' until the year 1871. If no tax was to be levied or demandable until the year 1871, it is plain that the provisions in relation to the return and payment of the tax imposed are inapplicable to dividends declared and payable in 1870; and if no provision is made for the return and assessment of dividends then declared, as in other cases, is not the conclusion irresistible that they were not intended to be placed in the category of subjects upon which a tax was imposed?

"Whatever signification, then, the words 'hereafter declared,' as applied to dividends, may have, they cannot be interpreted to subject dividends to a discriminating tax against the uniform course of previous legislation and the clear meaning of the preceding words, which limit the tax imposed to the year 1871, and to subjects properly classified as belonging to that period.

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"Even if they can be regarded as casting doubt upon the meaning of the law, that doubt must be resolved in favor of the citizen. The exercise of the power of taxation is not to be affirmed upon conjectural or arbitrary inferences. No burden is to be taken as imposed upon the citizen which the government has not clearly made it his duty to assume. Nor can any portion of his property be exacted for any purpose, except in pursuance of an unambiguous mandate.

"Whatever degree of liberality, therefore, may be allowable in the construction of statutes relating to the revenue of the government, there is neither reason nor justice in expanding them by a strain upon the ordinary import of their words, to give effect to a hypothetical legislative intention.

"It results, then, that dividends declared and payable by railroad companies during the last five months of 1870 were not subject to taxation; and that the tax described in the plea was assessed without authority of law."

Judgments were accordingly entered for the plaintiffs; that is to say, for the corporations; and to bring them here these writs of error were taken.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, for the collector, plaintiff in error; Mr. F. C. Barlow and Mr. J. E. Gowan, contra.

Mr. Justice HUNT delivered the opinion of the court.

The language of the act of July 14th, 1870, is too manifest to admit of a doubt that Congress intended to extend for two years the tax upon the incomes of individuals. Without further legislation the power to levy that tax expired with the year 1870. A tax for the year 1869 had been levied in March, 1870, under the authority of the laws referred to. No further levy could be made. It is then provided by section six that there shall be levied for the years 1870 and 1871 a tax upon individual incomes.

By the statute of 1864 that portion of the income of an individual derived from dividends on stocks, interest on corporate bonds, and the like, was directed not to be included in his return of gains and profits, and no tax was assessed

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to him directly for that portion of his income. Another section of the same statute provided that dividends of earnings, interest on corporate bonds, and the like should be taxed to the corporation directly and in its name. While these items were passed over in the individual account, they were rigidly and searchingly sought out and taxed in the name of the corporation. We here find the explanation of that portion of the seventh section of the act of 1870, which excepts from individual income as a subject of taxation "that portion thereof from which, under authority of acts of Congress previous hereto, a tax of 5 per centum shall have been withheld."

Intending and expecting that this source of taxation would continue to be reached by the taxation upon corporations, it was intended that the individual should be relieved from the imposition.

From the examination of the *Globe Congressional Journal* of the 41st Congress,* and of the original Journal of the House of Representatives, we learn that as originally reported and passing the House the words "for and during the year 1871," now making a part of the fifteenth section, were not in the bill; nor were there any corresponding words. The bill read:

"That there shall be levied and collected a tax of two and one-half per centum on the amount of all interest or coupons, &c., . . . and on the amount of all dividends of earnings or gains . . . hereafter declared, whenever and wherever the . . . same shall be payable, and to whatsoever person the same may be due."

As it thus stood the imposition of the tax upon the dividends of corporations was unlimited as to time.

The same record shows that the Senate amended the fifteenth section by inserting after the word collected as follows:

"During the years 1871 and 1872."

* Page 5516.

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So that it would read—

"Be it enacted that there shall be levied and collected during the years 1871 and 1872 a tax of two and one-half per centum on the amount of all interest, &c."

Up to this point it stands that the House proposed to tax the corporations upon their dividends and coupons without limit as to time, while the Senate desired to fix their liability to the taxes to be levied and assessed during the years 1871 and 1872.

The record further shows that the House disagreed to this and to other amendments of the Senate. There were many points of difference. A committee of conference was appointed, the chairman of which, Mr. Schenck, reported to the House on the 13th day of July, among other things, "that the House receded from their disagreement to the twentieth amendment of the Senate [the one above quoted], and agree to the same with the following amendment:

"Strike out said Senate amendment and insert in lieu thereof the following: 'for and *during the year* 1871.'"

This was agreed to, and the section which we are now considering became a law in its present form.

Connected directly with this point is the provision of section seventeen of the same act, viz., that sections 120, 121, 122, and 123 of the act of June, 1864, as amended, shall be construed to impose the taxes therein mentioned to the 1st day of August, 1870, but after that date no further taxes shall be levied or assessed under the said sections.

These sections are the ones imposing the income tax of five per cent. upon corporations, and that tax is thus continued upon corporations until August, 1870, and no longer.

The journal and record show two other facts:

1st. That the words "hereafter declared," in the fifteenth section of the act of 1870, immediately following the words "dividends of earnings, income, or gains," formed a part of the original bill as it passed the House and was sent to the Senate.

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2d. That the seventeenth section, by which it was enacted that the sections of the statute of 1864 imposing the income tax of five per cent. upon corporations, should be construed to impose the taxes therein mentioned to the 1st day of August, 1870, but that after that date no further tax shall be levied or assessed under those sections, formed no part of the original House bill. It was an amendment proposed on the part of the Senate, and agreed to by the House.

By section fifteen it is declared that this tax of two and one-half per cent. shall be imposed "on the amount of all dividends of earnings, income, or gain hereafter declared" by any bank, railroad company, trust company, &c. All the dividends which shall be thereafter declared by any bank or railroad company shall be taxed. No time is limited within which the dividend is to be declared. No restriction is made except that it shall be "hereafter" declared, *i. e.*, after the 17th of July, 1870, the date of the passage of the act. The dividends in question were all declared after this date, and they fall within the general language made use of.

The first branch of the section directs the levying and collection of taxes on dividends for and during the year 1871; the latter branch imposes the tax upon all dividends thereafter declared.

Under these circumstances, we are compelled to ascertain the legislative intention by a recurrence to the mode in which the embarrassing words were introduced, as shown by the journals and records, and by giving such construction to the statute as we believe will carry out the intentions of Congress.

The intention of the House upon the record we have quoted is plain. That body proposed to tax all dividends thereafter declared by corporations, but yielded to the indisposition of the Senate to assent to that principle.

The Senate proposed to amend this principle, first, by the limitation of the tax of five per cent. to August, 1870; and, second, by inserting the words "there shall be levied and collected during the years 1871 and 1872," which gave a tax of two and a half per cent. for those two years. The order

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in which these amendments were agreed to in the Senate is not easily ascertained. The record does not show the time of the adoption of the second amendment by the Senate. The Senate consented to say that the tax should be levied and assessed "during the years 1871 and 1872." The House agreed to the amendment by making it to read not only "during" but also "for" the year 1871, and omitting the year 1872, and the result appears in the act we are considering.

This action does not correctly indicate the feeling of either body, as the House evidently wished to impose an extended tax, while the record shows that in several of its votes the Senate voted to abolish entirely the income tax, both as to individuals and as to corporations.

The defendant's construction of the fifteenth section assumes that Congress imposed the tax upon corporations, until August 1st, 1870; that from that date till January 1st, 1871, no tax was imposed, and that after that period the tax was again imposed; that there was a hiatus for five months. The tax upon individuals meanwhile was imposed during the whole of the years 1870 and 1871. It is impossible to believe Congress intended to make this discrimination. It is entirely unreasonable, and is not in harmony with the well-known views of Congress on the subject.

The rate of taxation to August 1st, 1870, was five per centum. Accordingly section seventeen enacts that the taxation under sections 120, 121, 122, 123, of the act of 1864, which would be at and after that rate, shall be paid by the corporations until August 1st, 1870, but after that time no further taxes shall be levied or assessed under those sections. There is no enactment that the corporations shall not be taxed on dividends after August 1st, 1870, but that the force of those sections shall extend no farther. Subsequent taxes are by virtue of other authority. Each rate was intended to be provided for in this statute, as we find that the five per cent. may be collected by virtue of the seventeenth section, and the fifteenth section may be construed as saying that the tax shall be extended through the year 1871, and that

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the dividends thereafter declared during the year 1870 shall be subject to the tax of two and a half per cent.

The ambiguous terms of the statute prevent the possibility of a satisfactory solution of the question presented. We are inclined to adopt the construction practically placed upon it by the administrative department of the government, which is this: that effect is to be given to the words "hereafter declared," by holding that they cover all the dividends and additions of the year 1870, after the passage of the act; and that the words "levied and collected during the year 1871" relate to the time when the tax is to be enforced rather than as a limitation to the tax itself. Congress may have assumed that the dividends after August would not be declared until the end of the year should be nearly reached, and that they would be properly levied and collected in the year following. The statute hereinbefore quoted, showing that the tax upon individual incomes is to be levied and collected in the year following the period for which they are imposed by the statute, is an illustration of what these words may mean. The words in question do not necessarily limit the kind of property to be taxed or the period of time for which the tax is laid. The tax cannot be levied or collected until 1871, but it may be imposed upon all dividends, additions, or payments of interest made or declared after the passage of the act of July 17th, 1870.

JUDGMENT REVERSED.

Dissenting, Justices DAVIS, STRONG, and BRADLEY.

SLACK v. TUCKER & Co.

1 Under the seventy-ninth section of the Internal Revenue Act of 1864, as amended by the act of July 13th, 1866 (14 Statutes at Large), persons who sell goods in their own name, at their own store, on commission, and have possession of the goods as soon as the sales are made, and who deliver or send them off to their customers—such sales being to an ex-

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tent exceeding $25,000 per annum—are to be taxed as "wholesale dealers" not less than persons who sell to that amount on their own account.

2. The fact that the manufacturers of the goods paid the five per cent. known as the "manufacturers' tax" does not change the case.

3. Persons selling goods in the way stated in the first paragraph above, are not "commercial brokers" within the fourteenth clause of the said section. Such brokers are those persons who, as brokers merely, negotiate sales or purchases for others, and not in their own names nor on their own account.

ERROR to the Circuit Court for the District of Massachusetts.

Tucker & Co., partners, sued, in the said court, Slack, collector of internal revenue in the city of Boston, to recover the amount of certain taxes paid by them under protest, and which they alleged to have been illegally assessed. The court, having tried the cause without a jury, held the tax illegal and a recovery was had. This writ of error was brought by the collector to reverse the judgment.

The tax was assessed against Tucker & Co. as "wholesale dealers" under the seventy-ninth section of the Internal Revenue Act of June 30th, 1864, as amended by the act of July 13th, 1866.*

It was agreed, on the trial, that if upon the facts the court should decide that the plaintiffs were not liable to the tax as "wholesale dealers," but were liable to a tax of one-half the amount as "commercial brokers" under the fourteenth clause of the seventy-ninth section, and under the ninety-ninth section as amended, judgment should be rendered in their favor for half the amount claimed and interest, subject to the defendant's exceptions.

The statutory provisions referred to, and on the construction of which the case principally depended, were expressed in the following terms:

1st. As to wholesale dealers, the seventy-ninth section, as amended, enacted thus:

"Wholesale dealers, whose annual sales do not exceed $50,000, shall pay $50; and if their annual sales exceed $50,000, for every

* 14 Stat. at Large, 115.

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additional $1000 in excess of $50,000, they shall pay $1. . . . Every person shall be regarded as a wholesale dealer whose business it is, for himself or on commission, to sell, or offer to sell, any goods, wares, or merchandise of foreign or domestic production, not including wines, spirits, or malt liquors, whose annual sales exceed $25,000."

An exception was made in favor of manufacturers selling their own goods, by section seventy-four, as amended by the act of July 13th, 1866:*

"But nothing herein contained shall require a special tax for . . . the sale by manufacturers or producers of their own goods, wares, and merchandise, at the place of production or manufacture, and at their principal office or place of business, provided no goods, wares, or merchandise shall be kept except as samples at said office or place of business."

2d. As to commercial brokers, the fourteenth clause of the seventy-ninth section, as amended in 1866, enacts as follows:†

"Commercial brokers shall pay $20. Any person or firm whose business it is, as a broker, to negotiate sales or purchases of goods, wares, or merchandise, or to negotiate freights and other business for the owners of vessels or for the shippers or consignors or consignees of freight carried by vessels, shall be regarded a commercial broker."

And section ninety-nine, as amended, provides:‡

"And there shall be paid monthly on all sales by commercial brokers of any goods, wares, or merchandise, a tax of one-twentieth of one per centum upon the amount of such sales."

Under these statutes the plaintiffs contended first, that the sales made by them were made as mere agents of the manufacturers at their principal office and place of business, and therefore came under the exemption provided in section seventy-four, above quoted; secondly, that, at most, they were commercial brokers, and therefore liable for only one-half the amount for which they were assessed.

* 14 Stat. at Large, 113. † Ib. 117. ‡ Ib. 134.

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The facts on which they relied in support of these positions sufficiently appeared from the bill of exceptions taken by the collector on the trial of the cause. It was shown—the testimony of the plaintiffs themselves showing this—that four manufacturing corporations, two of them having their factories at Nashua, New Hampshire, and chartered by that State, and two of them having their factories at Waltham and Clinton, in Massachusetts, and chartered by the latter State, and all manufacturing cotton goods, had the same general office in Boston, where they held their meetings, transacted their business, and kept their records, and where they kept a common clerk and a common treasurer. The latter was the chief executive officer, buying all the raw material and making the other purchases for the corporations, taking care of their finances, and under the respective boards (which consisted of substantially the same persons) managing and controlling the affairs of the several corporations, their agents and servants.

Between these corporations respectively and the plaintiffs, who were a mercantile firm, transacting business in Boston, under the name of Tucker & Co., there were separate agreements, either in writing or by parol, that the plaintiffs should sell *all* the goods manufactured by each corporation, for a fixed percentage on the amount of sales, and the course of business of the plaintiffs under and in pursuance of these agreements was as follows, that is to say: The plaintiffs had a store in Boston, which they hired in their own names, and for which they paid the rent, with clerks, bookkeepers, and other servants whom they employed and paid. In this store was a counting-room, in which their business was transacted, and chambers where samples of goods manufactured by the corporations were kept. No goods except sample-bales and packages were there kept, unless occasionally some goods which had been mis-sent, or for some reason had not been accepted by a customer, found their way there.

The plaintiffs were known to be the agents of these corporations, to sell their goods, and they sold only the goods of these corporations, and their course of business was as

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follows: They were kept informed daily of what was manufactured at the several mills, and made sales to purchasers as opportunity offered. They kept in their office a different set of books for each of the corporations, and when a sale of any of the goods of any of the corporations was effected, an entry of the fact was made in the books of that corporation, and they informed the manufacturing agent at the mill of such corporation (where all the goods were stored as they were manufactured) to send such goods to the purchaser. The goods were then packed at the mill, and directed to the purchaser, and forwarded to Boston by rail, where a truckman, employed and paid by the plaintiffs, received them and delivered them to the purchaser, if in Boston, or at the steamboat landing or railroad station, if the goods were to be sent elsewhere. The freight by rail, from the mill to Boston, was paid by the plaintiffs, and was, with the expense of truckage, charged by them to the respective corporations. When sufficient time had elapsed after the sale for the delivery of the goods, the plaintiffs sent to the purchaser a bill of the goods in their own names, separate bills being rendered for the goods of each corporation, and not as agents, and in due course, when they were settled, receipted the bills in their own names, and not as agents. When the bills were paid in cash, the money was received by the plaintiffs and deposited in bank in their own names; and if on any given day money was received from sales of the goods of the different corporations, such money was mingled together and deposited by the plaintiffs in their own names. If the bills were settled by notes, the notes were made payable either to the order of the makers, and by them indorsed, or to the order of the particular corporation whose goods were sold. The plaintiffs did not put their names upon any such notes, nor did they guarantee any of their sales. They delivered these notes from time to time to the treasurer, and from time to time paid him money, and every month settled their account with each corporation.

The plaintiffs had a branch house in New York, and an agency in Philadelphia, and the sales in New York and

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Philadelphia were reported to the Boston house, and deliveries and collections were made as to such sales in the same manner as in sales at the Boston house. Such sales were not included in their returns to the assessor at Boston, and no part of the taxes which this action was brought to recover was paid upon such sales at New York and Philadelphia.

It was proved also that the several corporations had paid what is called the "manufacturers' tax"—a tax of five per cent.—upon all the goods that were sold by the plaintiffs.

Upon this evidence adduced by the plaintiffs, the defendant moved for judgment on the following grounds:

1st. Admitting all that was attempted to be proved, it manifestly appeared that the plaintiffs were wholesale dealers within the meaning of the law, and so liable to pay the tax collected.

2d. That the sales made by the plaintiffs were not sales made by the manufacturing corporations within the meaning of the law; and

3d. If the sales were made by the plaintiffs as agents of the manufacturing corporations, within the meaning of the law, they were not made at the place of manufacture, nor at the principal office or place of business of the corporations, but were made at the store of the plaintiffs.

The court overruled the motion and ordered judgment to be entered for the plaintiffs for the full amount claimed.

This judgment was of course to be reversed if, upon the evidence as disclosed, the defendants in error were either wholesale dealers or commercial brokers within the act. In the one case they could have recovered nothing, in the other only one-half of what they did recover.

If on the contrary they were neither "wholesale dealers," nor "commercial brokers," within the act; or if the sales were sales made by the manufacturers at the place of production and at their principal office or place of business—no samples being kept there—the judgment would be to be affirmed.

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Argument against the tax laid.

Mr. H. D. Hyde, in support of the judgment below:

The judgment below should be affirmed. A corporation can only act through agents, and the defendants were the agents of the several corporations for selling their goods. That they were such agents appears from their course of dealing and from the admitted fact that "there were separate agreements, either in writing or by parol, that the defendants should sell *all* the goods manufactured by each corporation for a fixed percentage on the amount of sales." The ownership or possession of the goods never passed from the several corporations to the defendants. The transactions of each corporation were kept on separate books; separate bills of the goods of each corporation when sold were rendered; all expenses of transportation were paid by the respective corporations; and all notes taken for the payment of goods sold were the property of each corporation, and were delivered to its treasurer. The defendants "were known to be the agents of these corporations to sell their goods." An action could have been maintained by or against the several corporations upon the contract of sale.

If the defendants were the agents of the respective corporations for selling their goods, were the goods sold at such a place that no tax could be assessed upon the sales? It is admitted that only samples were kept at the place of sale.

The defendants sold *all* the goods of each corporation; none were sold at the place of production or manufacture. The only place where their goods were sold was the place where the defendants sold them. This place was, then, not only their principal office or place of business for selling, but it was their only office or place of business for that purpose.

The purpose of a corporation in manufacturing goods is that it may sell them, and thereby make a profit. The goods are manufactured to sell, and, after they are manufactured, the principal business is to sell them. It is hardly fair to suppose that Congress intended to distinguish between the relative importance of the duties of the treasurer and selling agent of a corporation, but that the corporation having paid the "manufacturers' tax," five per cent., upon

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its production, should be allowed to sell its own goods, through its own agents, at the place of production, or at its office or principal place of business for selling.

It may be argued that the defendants sold goods in Boston, New York, and Philadelphia, and that it does not appear which of the three was the principal place, or at which place the largest amount was sold. But it can hardly be supposed that Congress intended that, if a corporation manufactured goods in Maine, it should not have a right to sell them through their own agents at a recognized place of business in each of these cities upon the same terms; and that if it had an office and agent for selling in Boston, it could not have an additional office and agent for selling in New York, without paying in the latter place a tax of one dollar per thousand upon all its sales. In the present case, the goods upon which the tax was collected were all sold in Boston, and all sales passed through the books of the Boston house, and their place of business was the principal one for sales.

It is asserted by the government that if the defendants were not required to pay the tax of one dollar per thousand on all sales made by them as wholesale dealers, they were liable to pay one-half of that amount as "commercial brokers." This we admit, provided that they were not exempt as previously shown.

A wholesale dealer is a commission merchant who has possession of goods and sells them, one "whose business it is for *himself* or on commission to sell or offer for sale any goods," &c.

A commercial broker is one "whose business it is, as the *agent* of *others*, as a broker to negotiate sales or purchases of goods," &c.

The defendants were never commission merchants; and if they were not the selling agents they were only brokers, negotiating sales for their principals, and should only have been taxed as such. The distinction between a "wholesale dealer" and a "commercial broker" is as marked and distinct as it is between a commission merchant and a broker.

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Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, contra, for the plaintiff in error.

Mr. Justice BRADLEY delivered the opinion of the court.

The general meaning of the act of Congress in the passages under consideration is sufficiently clear. Congress evidently intended to tax as "wholesale dealers" as well those who sold goods as commission merchants as those who sold on their own account; always excepting manufacturers, selling at the place of manufacture, or by sample at their principal office and place of business. The intention is equally evident to tax as "commercial brokers" those who, as brokers merely, negotiated sales or purchases for others, and not in their own names nor on their own account.

We are clearly of opinion that the evidence propounded by the plaintiffs showed that the sales were not the sales of the corporations made by the plaintiffs as mere agents, much less that they were made at the principal office or place of business of the corporations. The latter had an office and place of business of their own where their principal executive officer managed their executive and financial operations, and to which any persons having business with the corporations would naturally go. On the contrary, the store of the plaintiffs was their own store, hired and furnished by themselves. The clerks employed in it were their own clerks. All the expenses were paid by themselves. The business was carried on in their own names. The sales were made, and the bills made out, in their names. The money arising from the sales was paid to them and deposited to their account. They charged regular commissions on the sales. It is true they sold by sample, and did not keep the goods in their store; but that did not make the sales any less their own. Persons selling their own goods often do the same. But, though they did not keep the goods at their store, and though, as sales were made, the goods by their direction were put up at the mill and directed to the purchasers, yet they were sent to and received by the plaintiffs; who de-

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livered them if the purchasers were in Boston, or shipped them if the purchasers resided elsewhere. The goods passed through their hands before the purchaser received them. They came into their possession as soon as it was necessary to enable them to fulfil their contracts of sale.

In our opinion, therefore, the plaintiffs were commission merchants, and chargeable as such with the tax in question as "wholesale dealers." The difference between a factor or commission merchant and a broker is stated by all the books to be this: a factor may buy and sell in his own name, and he has the goods in his possession; while a broker, as such, cannot ordinarily buy or sell in his own name, and has no possession of the goods sold.* The plaintiffs made the sales themselves, in their own names, at their own store, and on commission, and had possession of the goods as soon as the sales were made, and delivered or shipped them to their customers. This course of business clearly constituted them commission merchants as contradistinguished from mere brokers or agents.

The fact that the corporations paid the manufacturing tax of five per cent. on the same goods is of no consequence at all in deciding the case. The tax in question was not imposed upon the corporations, but upon the commission merchants, as a tax on their business. It would even have been imposed on the corporations themselves if they had sold the goods in any other manner than as provided in the seventy-fourth section of the act, namely, at the place of manufacture, or, by sample, at their principal office and place of business.

We are of opinion, therefore, that upon the evidence adduced, the court ought to have given judgment for the defendant instead of the plaintiffs.

JUDGMENT REVERSED, with directions to award

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* See Story on Sales, § 91; Story on Agency, § 84; 2 Kent, 622, note; and cases cited.

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Statement of the case.

Mr. Justice FIELD dissented from the judgment, being of opinion that the plaintiffs were not wholesale dealers, either within the common acceptation of the terms or the meaning of the statute.

SCHOLEY v. REW.

1. The "succession tax," imposed by the acts of June 30th, 1864, and July 13th, 1866, on every "devolution of title to any real estate," was not a "direct tax," within the meaning of the Constitution; but an "impost or excise," and was constitutional and valid.
2. A devise of an equitable interest in real estate, in which personal property had been invested by the trustee with the assent of the devisor, before the making of the will, was a devolution of real estate within the meaning of the acts of June 30th, 1864, and July 13th, 1866, and the devisee is liable to the succession tax imposed thereby, in respect of it, if he has received its value, although in proceedings for partition he has had assigned to him only personal property.
3. An alien to whom a devise of an interest in real estate has been made, and who has received its value in proceedings for partition, is estopped to set up against a demand for a succession tax thereon, that by the law of the State where the estate is, the devise is absolutely null and void.
4. *Quære.* Whether a general assignment of errors that the judgment below on a special case was for the wrong party, is sufficient.
5. *Semble.* That an objection that a devise is void because of the alienage of the devisee, cannot first be taken by him in this court on a writ of error to the judgment of a Circuit Court on a special case, although the record discloses the fact of alienage.

ERROR to the Circuit Court for the Northern District of New York, in which court Scholey, a British subject, sued Rew, collector of internal revenue, to recover the amount of a "succession tax" which Rew, as collector, had demanded of him, Scholey, and which—asserting it to be illegal—Scholey had paid only on compulsion and under protest.

The case was found specially, by the Circuit Court, on a waiver of a jury, under the act of March 3d, 1865, which authorizes such a finding by the court, and enacts that when

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the finding is special the review by this court may extend to the sufficiency of the facts found to support the judgment. The case so found was thus:

Elwood, of Rochester, New York, died in 1863, leaving a widow and three minor children, and a large amount of personal property, besides certain real estate.

He left also a will, by which, after certain bequests of personal property, he directed that all the residue of his estate, real and personal, should be divided by his executors between his wife and three children, according to the statutes of New York, as if he had died intestate; that is to say, as the Reporter supposes—though the language or effect of the statute was nowhere stated in the record or briefs—one-third to the wife and two-thirds between the children. And he appointed his wife and two friends, Mumford and Russel, executors of the will.

In May, 1864, Russel, as acting executor, presented to the Supreme Court of New York a petition, setting forth that the assets of the estate were about $500,000, chiefly invested in personal securities, but including a large amount of money uninvested; that it was deemed for the interest of the estate to invest a portion of the assets in productive real estate in Rochester; and asking authority to make the purchase of certain property described, in that city, for $73,000.

In pursuance of this prayer an order was made authorizing the executors to invest so much as should be necessary of the assets of the estate in the purchase of the real estate described; and "to purchase and to hold the same as such executors."

Under the authority of this order, the executors in May, 1864, took a conveyance of the premises to themselves as executors of Elwood's will, the survivor or survivors of them, their successors or assigns, for $72,602. These premises were thenceforth styled and spoken of as the "Elwood lot," and, after being improved, as the "Elwood block."

At the time of Elwood's death, he owned four parcels of real estate in Rochester, one of them a vacant lot on Mill Street, which parcels were altogether of the value of $50,000.

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After the purchase of the Elwood lot the executors, by authority of the Supreme Court of New York, erected a building on the vacant lot on Mill Street, which cost $15,111, and also made improvements upon the Elwood lot at a cost of $49,006, which increased the value of the property at least to that amount. All these improvements were completed in the spring of 1868, and were paid for, as was also the purchase price of the Elwood lot, out of the personal property of Elwood's estate.

In October, 1867, Mrs. Elwood, the widow of Elwood, was married to Scholey, the plaintiff in the present case; and in September, 1869, she died, leaving a will. By her will, after five annuities during the lives of the five annuitants, amounting altogether to $4100, annually, certain specific legacies of personal property, and certain legacies of money, amounting to $6500, she gave all the residue of her property, real and personal, to her husband, the plaintiff, and appointed him with the above-named Mumford and one Worcester, executors.

In February, 1870, Mumford, as sole surviving executor of Elwood's will (Russel having died in 1866), instituted joint proceedings in the Supreme Court of New York against the three children of Elwood, against Scholey, Worcester, and Mumford, as coexecutors of Mrs. Scholey's will, and against Scholey individually as her husband and residuary legatee.

The complainant alleged that Mrs. Scholey acquired some interest in or title to the Elwood block, and the once vacant lot on Mill Street, by reason of the same having been bought and improved out of Elwood's personal estate, and that Scholey, by virtue of Mrs. Scholey's will, claimed some title to or interest in it. It prayed that Mumford's accounts, as sole surviving executor of Elwood, and Mrs. Scholey's as sole executrix, might be settled and adjudged final and conclusive, and that her executors might be required to render accounts in furtherance of that purpose, including an account of all rents or income of said real estate received by her; that an account might be taken of all Elwood's per-

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sonal estate, and its value at the time of his death and at all times afterwards; that Mrs. Scholey's share in that personal estate at the time of her death and at the time of the accounting, and also "what right or title she had in and to the said real estate, bought or improved out of the personal estate of" Elwood, might be determined; that when such share or interest should be determined, it should be partitioned from the body of Elwood's estate; that the shares of the three children in their father's personal estate might be determined and partitioned off to them in severalty, and that thereafter the share of each child might be kept separate, to the end that such share, with its increase, might be paid to each respectively as he or she should become entitled to receive it.

Scholey answered, admitting the making of the various orders and the investment of the sums mentioned in the purchase and improvement of real estate; denied the binding character of the orders, but admitted the propriety of the investments in case the advantages thereof were to be equitably shared by the parties interested in the funds invested, in proportion to their respective interests. He admitted that no distribution of Elwood's personal estate had been made, and joined in the prayer for an accounting and distribution, praying further that upon Mrs. Scholey's share being ascertained, the same, or such part of it as should not be required to provide for the legacies given by her will, might be delivered to him as her residuary legatee.

The other defendants also answered, and the same was referred to three referees to try the issues; to take and state the several accounts mentioned in the complaint; to determine the extent and value of the interest in Elwood's personal estate, which Mrs. Scholey's executors, and her husband as her residuary legatee, were entitled to receive under her will; to determine the share of each of Elwood's children in his personal estate; to determine whether actual partition of his personal estate could be made between Mrs. Scholey's executors and Mumford as Elwood's surviving executor, and if so, to make such partition; and to deter-

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mine whether Elwood's personal estate could be actually partitioned as between his three children, and if so to make such partition.

These referees reported on the 5th of November, 1870, among other things, as follows:

That Elwood's personal estate at his death amounted to $331,709, and at the date of the report to $492,374, which last sum included the building on the Mill Street lot, at $15,111 and the Elwood block at $135,000; and that the value of such personal estate subject to partition at the latter date, after deducting three specific bequests or charges in Elwood's will, was $467,402, which sum included the Elwood block and Mill Street building at the above valuation.

That the extent and value of the shares and interests of the several parties in Elwood's estate subject to partition, after making all proper deductions, was as follows:

Mumford, Worcester, and Scholey, as executors of Mrs. Scholey, and Scholey as her residuary legatee, ...			$154,894 10
Elwood's children—Frank,	$104,113 22		
Agnes,	103,359 87		
Elizabeth,	105,084 87		$312,507 90
			$467,402 00

That the referees had determined that actual partition of said personal estate could be made between all said parties, and had made such partition, and had set apart to Mrs. Scholey's executors, in full of all claim which they or her residuary legatee might have upon Elwood's estate, the following property:

Bonds of the United States, ...	$128,151 25
Railroad and telegraph bonds, ...	7,525 00
Bond and mortgage, ...	9,218 75
Promissory note, ...	5,098 10
Railroad stocks, ...	720 00
Cash, ...	4,181 00
	$154,894 10

That the referees had set apart to Elwood's three children their respective shares as above stated, schedules of which

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similar to the foregoing were given, and each schedule contained as the last item:

> "One-third of the appraised valuation of the Elwood block and Mill Street building, ... $50,087"

That they had not included the Elwood block in the partition between Elwood's three children, because it was not capable of actual partition.

A judgment was entered upon this report December 8th, 1870, reciting the partition, including the setting apart to each of the children of the undivided one-third of the Elwood block; confirming such partition, and adjudging that the complainant Mumford should remain in possession of the Elwood block as trustee for the children until they should respectively become of age.

Upon these facts the plaintiff here, Scholey, was assessed for a succession tax of six per cent. upon $45,000, as the value of one-third interest in the Elwood block. He asserted that he was not liable to such tax; that he never was entitled to such real estate or any part of it, and that he never had any interest in it as a successor. He appealed from the assessment to the Commissioner of Internal Revenue, who decided the appeal adversely to him, whereupon he paid the defendant, May 30th, 1871, the amount so assessed, being $2700, under compulsion and protest, and on the following day demanded repayment thereof, which was refused.

Upon this case, found as already said by the court, the plaintiff's counsel requested the court to order judgment against the defendant for $2700 and interest. But the court held, as a matter of law, that on the statutes governing the case and immediately hereinafter cited the defendant was entitled to judgment, and judgment was entered accordingly.

The assignment of errors was thus made on the brief of the plaintiff in error:

> "The sole question in the case is, was the plaintiff liable to a succession tax upon this property? The sole error assigned is the decision of the court in the affirmative."

The statute in relation to "succession taxes," in force at

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the time of Mrs. Scholey's death, in September, 1869, was the original Internal Revenue Act of June 30th, 1864,* as amended by the act of July 13th, 1866.†

It enacts:‡

That for the purposes of the act "the term 'real estate' shall include all lands, tenements, and hereditaments, corporeal and incorporeal;" and that the term 'succession' shall denote the *devolution of title* to any real estate."

"That every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof, upon the death of any person dying after the passing of this act, shall be deemed to confer, on the person entitled by reason of any such disposition, a 'succession.'"

That "there shall be levied and paid to the United States in respect of every such succession as aforesaid, according to the value thereof," duties at rates depending upon the degree of consanguinity between predecessor and successor; and where the successor is "a stranger in blood," at the rate of *six per cent.*

That the duty "shall be paid at the time when the successor, or any person in his right or on his behalf, shall become *entitled in possession* to his succession, or to the receipt of the income and profits thereof;" except that if it afterwards becomes more valuable by the determination of a prior charge upon or interest in it, an additional duty shall then be paid on its increased value.

That "the interest of any successor in moneys to arise from the sale of real estate, under any trust for the sale thereof, shall be deemed to be a succession chargeable with duty under this act, and the said duty shall be paid by the trustee, executor, or other person having control of the funds."

Also, that "the interest of any successor in personal prop-

* 13 Stat. at Large, 287–291, §§ 126–150.
† 14 Id. 140, 141.
‡ §§ 126, 127, 133, 137, 138, 139.

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erty, subject to any trust for the investment thereof in the purchase of real estate *to which the successor would be absolutely entitled*, shall be chargeable with duty as above."

The succession tax is by the act creating it* made a "lien" on the land, "in respect whereof" it is laid, and is to be "collected by the same officers, in the same manner, and by the same processes as direct taxes upon lands under the authority of the United States."†

By the same statute which imposes the duty on the succession to real property, a duty is also laid on legacies and distributive shares of personal property.‡ But while the rates of duty, as in the case of real property, vary with the degree of consanguinity, all *personal* property passing *from wife to husband* is exempt from tax, as well as that which passes from husband to wife, the succession to real property being exempt *only* in the latter case.§

Mr. Theodore Bacon, for the plaintiff in error:

I. *The statute imposing this duty is unconstitutional.*

It is within the prohibitions of the Constitution, which ordain that—

"Direct taxes shall be apportioned among the several States . . . according to their respective numbers."

And that—

"No capitation or other direct tax shall be laid unless in proportion to the census," &c.

The tax is a "direct tax," within all the decisions upon this subject, and it will be admitted that it is not laid in proportion to the census.

The opinions in the carriage-tax case, *Hylton* v. *The United States*,‖ while narrowing down the constitutional restriction to the utmost, distinctly recognize "a tax on land" as the *only* direct tax contemplated by the Constitution, except a capitation tax.

* §§ 145, 146.
† § 150.
‡ 13 Stat. at Large, 285–287, §§ 124, 125.
§ Ib. 286, § 124 *ad finem*.
‖ 3 Dallas, 175, 177, and 183.

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These views are approved in *Pacific Insurance Company* v. *Soule.**

The present is a tax *on land*, if ever one was. No doubt it is to be paid by the owner of the land, if he can be made to pay it; but that is true of any tax that ever was, or ever can be imposed on property. And as if to prove how directly the property, and not the property owner, is aimed at, the duty is made a specific lien and charge upon the land "in respect whereof" it is assessed.

More than this: as if to show how identical, in the opinion of Congress, this duty was with the avowedly direct tax upon lands which it had levied but a year or two before, it enacts that this *succession tax alone*, out of a great revenue system, should be collected by the same officers, in the same manner, and by the same processes as direct taxes upon lands under the authority of the United States.

II. *But, assuming the act to be valid, this case is not within it.*

1. There has been no "devolution of title to any real estate," either upon the plaintiff or upon any one else. And this is the statutory definition of a "succession."

The *title* to the Elwood block is, where it has always been since May, 1864, in the executors of Elwood.

2. The plaintiff has not "become beneficially entitled, in possession or expectancy, to any real estate, or the income thereof."

His testatrix never was "entitled" to the Elwood block, or to the income from it. Whatever rights she had were personal claims against the executors for a certain proportional interest in Elwood's *personal* property.

3. The orders of the Supreme Court of New York, obtained *ex parte*, assuming to authorize the acting executor of Elwood's will to invest certain funds in this block, were without effect, except as being a sort of evidence of good faith in the executors in making the investment. The beneficiaries under the will were still entitled to hold them to account for the personalty which came to their hands; and

* 7 Wallace, 444–451; and see Veazie Bank v. Fenno, 8 Id. 533; per Chase, C. J., 542–546.

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if the investment should prove unprofitable, to deny the propriety of it, and compel them to respond for the amount invested, as upon an abuse of their discretion. The circumstance that a justice of the Supreme Court concurred with them in considering the investment a desirable one, might tend to prove their good faith, but it could not discharge them.

The only investments authorized in the State of New York for funds like these, are such as allow of their being always subject to recall, principal as well as interest, for the benefit of the *cestuis que trust*, and these are well settled to be government stocks and loans upon real estate to much less than its value.*

4. But conceding the right of the executors to make the investment, their duty would be clear to *sell* the property again and reconvert it into government stocks or bonds and mortgages, if at any time they should be of opinion that the preservation of the fund demanded such change.

If they had, at least any time before the Elwood block was specifically set apart from the body of the estate to the three infant children, judged such sale to be advantageous, neither Mrs. Scholey in her lifetime, nor this plaintiff after her death, could have forbidden such change of investment. And notwithstanding all objections on the part of any beneficiary of the estate, the executors would have given absolute title, legal and equitable, to the purchaser, by their deed.

Nor has there ever been a time when Mrs. Scholey in her lifetime, or this plaintiff since her death, could compel either a partition or a conveyance of a share of the block, or an assignment of a fixed proportion of its income. How, then, could either of them be said to have "title" to either the block or its income; and how would that "title" be described?

Possibly *all* the beneficiaries together might have ratified the investment, but the dissent of one would have deprived an attempted ratification of all force. And three were infants and incompetent either to ratify or repudiate.

* King v. Talbot, 40 New York, 76.

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If, upon the distribution of the estate, this plaintiff had insisted that he was entitled, as the assessor asserts, to one-third of the Elwood block in severalty, both the executors and the court would have repudiated his claim, and would have told him, as their decree in fact told him, that his right was only to receive personal securities and money to an amount to be ascertained upon an accounting.

If Mrs. Scholey had died intestate, it is expressly adjudicated that her interest in the Elwood estate, except so far as it was realty at the time of Elwood's death, would have passed as assets to her administrator, instead of descending to her heirs.*

And this proposition seems to us conclusive of this case, for the statute nowhere distinguishes, in laying duties upon "legacies or distributive shares of personal property," on the one hand, and upon "successions to real estate" on the other, between descents by will and by operation of law. The fact that Mrs. Scholey made a will, while it makes an important difference as to who shall receive her property, can make none whatever as to its liability to pay a tax to the United States.

5. But this plaintiff never got anything like the rights even which his testatrix had. Her interest in this block has been appraised by the assessor at $45,000. But before the residuary legatee gets anything from her estate he must satisfy special legacies amounting to $6500, and pay certain annual charges for an indefinite period, amounting to $4100 a year, to say nothing of debts. It does not appear that there is *any* residuum for the plaintiff. But if, upon his final accounting as administrator, it shall turn out that there is a residue—which may well be less than the amount upon which he has paid "succession duty"—with what propriety is *his* share to be called real estate and charged with this tax, any more than the shares of the other distributees?

6. If it should be argued that he had, before distribution

* Rogers v. Patterson, 4 Paige, 409; Gibson v. Scudamore, 1 Dickens, 45; Witter v. Witter, 3 Peere Williams, 99; Earl of Winchelsea v. Norcliffe, 1 Vernon, 435; Awdley v. Awdley, 2 Id. 192.

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of the Elwood estate, some title "in expectancy" to the block or some part of it, it was not until he should become entitled "in possession" that the duty was to be paid. That certainly had not happened when this tax was levied and collected.*

7. So far as cases at all analogous appear in the books, the authorities seem to support our position.†

III. *The plaintiff is an alien. If Mrs. Scholey's alleged interest in the Elwood block was an "interest in real estate," the alleged devise of it to him was absolutely void by statute of New York.*

The statute enacts:‡

"SECTION 4. Every devise of any interest in real property, to a person who, at the time of the death of the testator, shall be an alien, not authorized by statute to hold real estate, shall be void. The interest so devised shall descend to the heirs of the testator; if there be no such heirs competent to take, it shall pass under his will to the residuary devisees therein named, if any there be, competent to take such interest."

If, under the laws of New York, Scholey got no "interest in real estate," he cannot be made to pay tax upon an interest.

It is no answer to say: this *is* an interest in real estate; the plaintiff has in fact got it; therefore he ought to pay duty on it. For if both premises were true the syllogism is not complete. It is further necessary, in order that the duty should attach, that he should have taken it "by will, deed, or laws of descent." There is no pretence of a deed. The will, so far as this is concerned, is void. Instead of taking *by* the law, he takes in spite of the law.

Mr. C. H. Hill, Assistant Attorney-General, contra, for the collector, defendant in error:

I. The succession tax is not a "direct tax" within the

* Blake v. McCartney, 10 Internal Revenue Record, 131.

† Attorney-General v. Holford, 1 Price, 426; Custance v. Bradshaw, 4 Hare, 315; United States v. Watts, 1 Bond, 578.

‡ Revised Statutes of New York, part 2, chapter 6, title 1, article 1.

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meaning of that term in the Constitution, and is constitutional and valid. The construction always given to Article 1, indicates that the only taxes which the Constitution regards as direct taxes, are capitation taxes and taxes imposed immediately on land, and which are capable of apportionment without producing any inequality or injustice.*

The term seems to have been derived from the Roman law, which recognized two kinds of direct taxes; a capitation tax (*capitis tributum*) and a land tax (*agri tributum*). Italy and privileged towns, which were exempted from these taxes, paid a tax of five per cent. on all testamentary successions (*vicesima hereditatum*), and on manumitted slaves, which together with customs and excises, seems to have been first imposed in the time of Augustus.†

If all taxes that political economists regard as direct taxes should be held to fall within those words in the Constitution, Congress would be deprived of the practical power to impose such taxes, and the taxing power would be thus greatly crippled; for no Congress would dare to apportion, for instance, the income tax. Hamilton,‡ whose brief is preserved to us in his works published by Congress, said in arguing *Hylton* v. *United States*:§

"It would be contrary to reason and every rule of sound construction, to adopt a principle for regulating the exercise of a clear constitutional power which would defeat the exercise of the power."

A succession tax is not a direct tax to any greater extent than the income tax, which was held by Mr. Justice Strong,‖ in the Third Circuit, to be constitutional and valid.

* Hylton v. United States, 3 Dallas, 171; Pacific Insurance Company v. Soule, 7 Wallace, 433, 446; Veazie Bank v. Fenno, 8 Id. 533, 546; 7 Hamilton's Works, 845; 1 Kent's Commentaries, 254*-256*; 1 Story on the Constitution, §§ 954, *et seq.*

† Poste's Gaius, 145, 146; Gibbon's Decline and Fall of the Roman Empire, ch. 6.

‡ 7 Hamilton's Works, 845.

§ 3 Dallas, 171.

‖ Clark v. Sickel, 14 Internal Revenue Record, 6.

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Argument in favor of the lawfulness of the tax.

It is assessed upon the landowner "in respect of" the property. Making it a lien upon the land is only a method of securing the tax, and does not make the tax a direct tax on land. The distinction is illustrated by the rule of law that a covenant in a lease to pay taxes assessed on the demised land, does not cover a tax imposed on the landlord in respect of the land.*

II. Under his wife's will, Scholey took an equitable interest in one-third of the estate in question, and he is liable to pay a succession tax in respect thereof, under section 127 of the act of June 30th, 1864.† He became entitled to the income of one-third of the Elwood block, upon the death of his testatrix, that is to say, of his wife, who had herself invested the personal property left by her first husband in this estate; and he consequently became liable to pay a succession tax in respect of the same.

If the Supreme Court had jurisdiction to authorize the investment of the personal estate of Elwood, in the purchase of real estate by his executors, its decree in the premises was in the nature of a proceeding *in rem*, and bound all persons interested therein;‡ and there is nothing in the record to show that its jurisdiction was not complete.

But there is no question here as to whether equity would treat the Elwood block as real or personal property. The property of Mrs. Elwood devised under her first husband's will had been converted by her own act into real property before she devised the same to her second husband, and this brings the case within the language of the statute. If Scholey thus acquired an interest in the Elwood block, the subsequent partition, whereby this entire estate was set off to the heirs of Elwood, does not relieve him from liability

* 2 Platt on Leases, 172, and cases cited; Palmer v. Power, 4 Irish Common Law, 191; Tidswell v. Whitworth, Law Reports, 2 Common Pleas, 326; Twycross v. Railroad, 10 Gray, 293; see also Society for Savings v. Coite, 6 Wallace, 594; Provident Institution v. Massachusetts, Id. 611.

† 18 Stat. at Large, 287, 288.

‡ Comstock v. Crawford, 3 Wallace, 396; Blount v. Darrach, 4 Washington Circuit Court, 657; Forsythe v. Ballance, 6 McLean, 562; Merriam v. White, 8 Gray, 316; Denny v. Mattoon, 2 Allen, 374–376.

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to pay a succession tax in respect of his share of it. He received its full value in other property.

The objection that Scholey being an alien, cannot take real estate by devise under the laws of New York, but that such pretended devise is made by them absolutely void, does not seem to have been taken below; but if open to be taken here, is of no avail, for two reasons:

1st. There is nothing to show that Scholey has not been authorized to hold real estate in the manner provided for in the statute cited by him. Indeed, as he received the benefit of the devise, the presumption would be that he had been so authorized.

2d. He having never disclaimed any interest in the devise, and having received its value in the partition of the Elwood estate, from those to whom it would descend if the devise to him is void, is estopped to set up alienage in order to avoid the payment of the succession tax due on the estate. Having received the benefit of the devise, he must bear any burden attaching to it; and the government being entitled to a tax from some one in respect of this estate, may take advantage of the estoppel, being precluded by Scholey's action from claiming a tax from the heirs at law.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Questions of importance were discussed at the bar, some of which it cannot be admitted are properly presented for decision. Such questions only as are specified in the assignment of errors are, in general, to be regarded as open to the plaintiff, and it is very doubtful whether an assignment that the decision of the Circuit Court is for the wrong party is sufficient to present any question for decision, but inasmuch as the findings of the court in this case are in their nature a special finding, the better opinion is that their sufficiency to support the judgment is open to re-examination.

* Flanigan v. Turner, 1 Black, 491; Swain v. Seamens, 9 Wallace, 273, 274; Pendleton County v. Amy, 13 Id. 297, 305; Pickard v. Sears, 6 Adolphus & Ellis, 469; Welland Canal v. Hathaway, 8 Wendell, 483; Denell v. Odell, 3 Hill, 215, 221, *et seq.*; Coke Littleton, 352*a*, 352*b*; Bigelow on Estoppel, 578, *et seq.*, and cases cited.

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Enough has already appeared to show that the plaintiff took under his wife's will an equitable interest in one-third of the estate in question, and the United States contend that in view of those facts he is liable to pay a succession tax or duty in respect of the same by virtue of the act passed to levy such taxes, as it applies to every past or future disposition of real estate by will, deed, or laws of descent, by reason whereof any person shall become beneficially entitled in possession or expectancy to any real estate, *or the income thereof*, upon the death of any person dying after the passage of that act.

Apply the rule to be deduced from that enactment to the facts found by the court, and it must follow that the argument of the United States is well founded, unless some one or more of the special objections to the tax set up by the plaintiff are sufficient to exonerate him from such liability. Those objections are as follows: (1.) That the act imposing the duty is unconstitutional and void. (2.) That the case is not one within the act imposing the tax or duty. (3.) That the plaintiff being an alien the devise to him is absolutely void.

1. Support to the first objection is attempted to be drawn from that clause of the Constitution which provides that direct taxes shall be apportioned among the several States which may be included within the Union, according to their respective numbers; and also from the clause which provides that no capitation or other direct tax shall be laid unless in proportion to the census or amended enumeration; but it is clear that the tax or duty levied by the act under consideration is not a direct tax within the meaning of either of those provisions. Instead of that it is plainly an excise tax or duty, authorized by section eight of article one, which vests the power in Congress to lay and collect taxes, duties, imposts, and excises to pay the debts and provide for the common defence and general welfare.

Such a tax or duty is neither a tax on land nor a capitation exaction, as subsequently appears from the language of the section imposing the tax or duty, as well as from the

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preceding section, which provides that the term succession shall denote the devolution of real estate; and the section which imposes the tax or duty also contains a corresponding clause which provides that the term successor shall denote the person so entitled, and that the term predecessor shall denote the grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived.

Successor is employed in the act as the correlative to predecessor, and the succession or devolution of the real estate is the subject-matter of the tax or duty, or, in other words, it is the right to become the successor of real estate upon the death of the predecessor, whether the devolution or disposition of the same is effected by will, deed, or laws of descent, from a grantor, testator, ancestor, or other person from whom the interest of the successor has been or shall be derived; nor is the question affected in the least by the fact that the tax or duty is made a lien upon the land, as the lien is merely an appropriate regulation to secure the collection of the exaction.

Indirect taxes, such as duties of impost and excises and every other description of the same, must be uniform, and direct taxes must be laid in proportion to the census or enumeration as remodelled in the fourteenth amendment. Taxes on lands, houses, and other permanent real estate have always been deemed to be direct taxes, and capitation taxes, by the express words of the Constitution, are within the same category, but it never has been decided that any other legal exactions for the support of the Federal government fall within the condition that unless laid in proportion to numbers that the assessment is invalid.*

Whether direct taxes in the sense of the Constitution comprehend any other tax than a capitation tax and a tax on land is a question not absolutely decided, nor is it necessary to determine it in the present case, as it is expressly decided that the term does not include the tax on income,

* Hylton v. United States, 3 Dallas, 171; 1 Kent, 12th ed., 255; Story on the Constitution, § 955.

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which cannot be distinguished in principle from a succession tax such as the one involved in the present controversy.*

Neither duties nor excises were regarded as direct taxes by the authors of the *Federalist*. Objection was made to the power to impose such taxes, and in answering that objection Mr. Hamilton said that the proportion of these taxes is not to be left to the discretion of the national legislature, but it is to be determined by the numbers of each State, as described in the second section of the first article. An actual census or enumeration of the people must furnish the rule, a circumstance which shuts the door to partiality or oppression. In addition to the precaution just mentioned, said he, there is a provision that all duties of imposts and excises shall be uniform throughout the United States.†

Exactions for the support of the government may assume the form of duties, imposts, or excises, or they may also assume the form of license fees for permission to carry on particular occupations or to enjoy special franchises, or they may be specific in form, as when levied upon corporations in reference to the amount of capital stock or to the business done or profits earned by the individual or corporation.‡

2. Sufficient appears in the prior suggestions to define the language employed and to point out what is the true intent and meaning of the provision, and to make it plain that the exaction is not a tax upon the land, and that it was rightfully levied, if the findings of the court show that the plaintiff became entitled, in the language of the section, or acquired the estate or the right to the income thereof by the devolution of the title to the same, as assumed by the United States.

Doubt upon that subject, it would seem, cannot be entertained if it be conceded that the subject-matter of the assessment is the devolution of the estate or the right to become

* Insurance Co. v. Soule, 7 Wallace, 446; Bank v. Fenno, 8 Wallace, 546; Clark v. Sickel, 14 Internal Revenue Record, 6.

† Federalist, No. 36, p. 161; 7 Hamilton's Works, 847; License Tax Cases, 5 Wallace, 462.

‡ Cooley on Constitutional Limitations, 495*; Provident Institution v. Massachusetts, 6 Wallace, 625; Bank v. Apthorp, 12 Massachusetts, 252

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beneficially entitled to the same, or the income thereof, in possession or expectancy, under the circumstances and conditions specified in the other parts of the section.

Decided support to the proposition that such is the true theory of the act is derived from the fact that the act of Parliament from which the particular provision under discussion was largely borrowed has received substantially the same construction.*

Suppose that to be the true construction of the act imposing the duty, and it is undeniable that the case before the court falls within its operation, unless the fact that the plaintiff is an alien exonerates him from such an exaction. Proof of the introductory proposition is found in the conceded fact that the testatrix in her lifetime invested the personal property left her by the will of her first husband, or some part of it, in the said real estate, and that the plaintiff became entitled to the same or to the income of one-third of the same at her decease, and consequently became liable to pay the succession tax or duty in question unless he is exempted from the liability by his alienage.

He does not deny that the investment of the personal property in the manner stated was made by the executrix and her associates, under the decree of the Supreme Court of the State, nor does he attempt to impugn the regularity or the validity of those proceedings, nor is there anything in the record that would enable him to do so with success if the attempt was made. Proceedings, it is true, were instituted to effect a partition of the estate of the testatrix, and it is equally true that those proceedings were carried forward to final judgment, from which it appears that the entire block, in respect of which the controversy has arisen, was set off to the heirs of his deceased wife, but it is clear

* Wilcox v. Smith, 4 Drewry, 49; Blythe v. Granville, 18 Simons, 195; Attorney-General v. Middleton, 3 Hurlstone & Norman, 136; Same v. Fitz-John, 2 Id. 472; Same v. Gardner, 1 Hurlstone & Coleman, 649; Same v. Gell, 3 Id. 629; Braybrooke v. Attorney-General, 9 Clark (House of Lords Cases), 165; Lyall v. Lyall, Law Reports, 15 Equity, 11; Jeves v. Shadwell, Law Reports 1 Chancery Appeals, 1; In re Badart, Law Reports, 10 Equity, 296.

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that that circumstance cannot relieve him from liability to pay a succession tax in respect to his share of the estate, for the obvious reason that he received its full value in other property assigned to him belonging to the same estate.

Beyond what may be inferred from the finding of the court, that the plaintiff is an alien, it does not appear that the defence of alienage was set up in the court below, nor does the assignment of errors contain any specification of such a question, except that the plaintiff is not liable to a succession tax and that the decision of the court below that he is so liable is erroneous. Such an assignment is not a compliance with the rule upon that subject, but the court is not inclined to rest the decision upon that ground.

Admit that the question is open, still the court is of the opinion that it cannot avail the plaintiff in this case, even under the comprehensive provision of the State statute. By that statute it is enacted that every devise of any interest in real property to a person who, at the time of the death of the testator, shall be an alien, not authorized by statute to hold real estate, shall be void.*

Nothing appears in the record of an express character to show that the plaintiff was ever authorized by statute to hold real estate, but it does appear that he claimed a one-third interest in the block in respect of which the succession tax was levied, and that his claim was recognized by the court and all the parties in the partition suit, and that the same was finally adjudged to him in the judgment of partition by an allowance for the value in other property left by the testatrix; nor can it make any difference that the corresponding allowance to him was of personal property, never converted into real estate, as the record of the proceedings in partition shows that the referees, whose report was confirmed and adopted by the court, adjusted the amounts as if the block was personal property, probably for the reason that the consideration of the same at the time of the investment was paid out of the personal property left by the former husband of the testatrix.

* 2 Revised Statutes of New York, 58.

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Opinion of the court.

Difficulty, it may be admitted, would attend the solution of the question if the issue was one between the plaintiff and the heirs at law of the testatrix, but the record shows that the testatrix became the owner of the property in the manner before stated, and that the interest claimed by the plaintiff was devised to him by the actual owner, and that he claimed it as if entitled to it under the will of the testatrix, and that he received one-third part of the income of the same from her decease to the commencement of the suit for partition, and that the claim made by him was fully recognized and included in the judgment of partition, and nothing is shown to support the theory that he is not still in the undisputed enjoyment of the allowance made to him in substitution for the one-third interest of the estate in respect of which the succession tax was levied.

Except for the purpose of avoiding the tax or duty due to the United States he has always claimed the benefit of the devise and still claims it for every other purpose. Had he disclaimed the right to take the interest devised to him the actual devolution of the estate would have given the right of possession to the heirs, either by the will or by the law of descent, and in that event the United States would not have met with any embarrassment in levying and collecting the succession tax or duty. By the terms of the will the devise was to the plaintiff, and inasmuch as he claimed the benefit of it without opposition, and has continued to enjoy its use, as before explained, to the present time, it followed that the heirs could not be subjected to such an exaction.

Tested by these suggestions it is clear that the claim of the plaintiff to recover back the amount of the tax or duty is inequitable, and in that regard the court here concurs in the proposition submitted by the United States, that the plaintiff is estopped to set up alienage as a ground of recovery under the circumstances of this case.*

* Swain v. Seamans, 9 Wallace, 278; Picard v. Sears, 6 Adolphus & Ellis, 474; Freeman v. Cooke, 2 Exchequer, 654; Foster v. Dawber, 6 Id. 864; Edwards v. Chapman, 1 Meeson & Welsby, 231; Bigelow on Estoppel, 378; Hyde v. Baldwin, 17 Pickering, 303.

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Syllabus.

Having accepted the beneficial interest under the will, and being in the undisturbed enjoyment of the same, he must bear the burden which legally attaches to the interest.

JUDGMENT AFFIRMED.

REEDY v. SCOTT.

1. Though as a general rule suits for infringement of a patent, are defeated by the surrender of the patent, and a new original bill—not a supplemental bill—is the proper sort of bill by which to proceed for an infringement under the reissue, yet where there has been a surrender and reissue, and the patentee has proceeded by a supplemental bill—the defendant making no objection to this sort of proceeding, but allowing proofs to be taken and the suit to proceed otherwise to a conclusion, as if the irregularity were wholly unimportant; the two parties proceeding respectively throughout the trial upon the assumption and concession that the reissued patent was substantially for the same invention as that embodied in the original patent—all objection to the irregularity in proceeding by a supplemental bill instead of by a new original one must be considered as waived.
2. Where, pending a bill in a Federal court for the infringement of a patent, the parties have agreed to submit the question whether a machine made by the defendant was an infringement, to a solicitor of patents, and to abide by his decision, and that if he decides that it is not, then that the bill in said suit shall stand dismissed; and the referee does decide that there is no infringement, but the complainant instead of having his original bill dismissed and filing a new original bill, files a supplemental bill alleging a surrender and reissue, and that the reissue is "for the same invention" as was secured by the original patent: in such case if it appear that the parties throughout the trial have treated the invention secured by the reissue, as substantially the same invention as that secured by the original letter, and have raised no issue about exact specification or any of those differences which may properly exist between a claim in an original patent and a claim in a reissue, but on the contrary have impliedly admitted substantial identity, having taken the issue on other matters, the matters, to wit, whether the complainant was not deceived when agreeing to refer, and whether the right of the referee to make any award was not legally revoked before any award was made by him, and whether, therefore, the award was not void: in such case if the court be satisfied that there was no deception, and that the award was made, and validly, then the plea of the award and agreement to be bound by it, may be properly pleaded to the supplemental bill as it might have been to the original one.

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Statement of the case.—The Patent act, § 53, on surrenders.

3. Where in a pending suit a patentee and a party charged with infringing agree to refer the question of infringement to a third person as arbitrator, and to be bound by his award, this court will presume, until the contrary is shown, that an award made is correctly made; and must so presume if, disregarding the award, the complainant goes on with his suit, and the case on coming here, comes with a record that exhibits neither the patent of the complainant nor any description of the machine which is alleged to infringe it.

APPEAL from the Circuit Court for the Southern District of Ohio.

The Patent Act of 1870, thus enacts:

"SECTION 53. Whenever a patent is inoperative or invalid by reason of a *defective or insufficient specification*, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new; if the error has arisen by inadvertence ... the commissioner shall on the surrender of such patent, ... cause a new patent *for the same invention*, and in accordance with the corrected specification, to be issued to the patentee ... for the unexpired part of the original patent, *the surrender of which shall take effect upon the issue of the amended patent*. ... And the patent so reissued, together with the corrected specification, shall have the effect and operation in law on the trial of all causes thereafter arising, as though the same had been originally filed in such corrected form."

This court in construing similar language in the previous Patent Act of 1836, said:*

"A surrender of the patent to the commissioner ... means an act which in judgment of law extinguishes the patent. It is a legal cancellation of it, and hence can no more be the foundation for the assertion of a right after the surrender than could an act of Congress which has been repealed. ... The antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists, and is in force at the time of trial and judgment, the suit fails."

In this state of the law this case arose. It was thus:

Reedy filed a bill, January 20th, 1871, in the court below,

* Moffett v. Garr et al., 1 Black, 282.

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the case being No. 1434, alleging the grant to him, as inventor, of letters-patent of the United States, No. 78,829, *dated the 9th of June*, 1868, for an improvement in hoisting machines; an "exemplified copy of which letters" the complainant alleged that he was ready to produce in court when required. No copy of any sort, however, was annexed to the bill.

The bill then averred that one Scott, without leave had, since the 9th of June, 1868, infringed the right of the complainant by making, using, and vending to others to be used, a number of machines—the exact number unknown—which "in principle and mode of operation" were the same as those described in the letters-patent.

The bill prayed for a subpœna, a discovery, an account, a preliminary injunction, and, upon the final hearing of the cause, for special and general relief.

A subpœna issued on the day of the filing of the bill, and was served.

On the 8th of March, 1871, the defendant having failed to answer, it was ordered that the bill should be taken as confessed.

On the next day this order was set aside, and the complainant had leave to file, and did file, a supplemental bill.

The supplemental bill related the substance of the original bill, and averred, "by way of supplement," that, since the filing of the original bill, the complainant had made a surrender of the letters-patent mentioned in it, dated June 9th, 1868, for the purpose of obtaining a reissue of the said letters upon an *amended specification*, drawings, &c. And that, on the 21st of February, 1871, such a reissue was granted by the Commissioner of Patents "*for the same invention;*" which letters reissued, No. 4273, were of record in the Patent Office. No copy of them was annexed.

It further averred that the defendant had without leave, and *since the date of the reissued letters-patent*, made, used, and sold to others to be used, machines which comprised the invention of the complainant as described and intended to be secured by the letters-patent *last mentioned*.

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The bill prayed that the case which it stated be taken into consideration with reference to the prayer of the original bill; that the defendant be required to answer upon oath, as if interrogated specially, &c.

On the 9th of May, 1871, the defendant, by leave, pleaded to the supplemental as well as to the original bill of complaint.

The substance of the plea was, that on the 20th of January, 1871, after the filing of the bill, an agreement in writing was made by the parties, under their hands and seals, reciting that whereas the complainant was *the owner of letters-patent*, No. 78,829, for an improvement in hoisting machines, granted June 9th, 1868, and whereas the defendant was the owner of letters-patent, No. 81,299, for an improvement in elevators, dated August 18th, 1868, and was building hoisting machines which he set up a right to manufacture under said patent and a pending application, but which were asserted by the complainant to be an infringement of his letters-patent No. 78,829, and whereas the complainant had filed a bill in equity against Scott, the defendant, Case No. 1434, in the Circuit Court of the United States for the Southern District of Ohio, and whereas the parties were desirous of avoiding the expense and delay of litigation, it was thereby, between the complainant and the defendant, mutually agreed to submit to S. S. Fisher, Esq., the question whether the machine manufactured by the defendant was or was not an infringement of the letters-patent No. 78,829, and to abide by his decision of the said question; that is to say, if Fisher should decide the said machine to be an infringement, the defendant agreed to abandon the manufacture of said machines, and to make no more of them in any part of the United States; and if Fisher should decide that the said machine was not an infringement, then the complainant agreed that his bill in said suit No. 1434 should stand dismissed at his cost, and that he would not molest the defendant in the manufacture of said machines.

That the bill mentioned in the agreement was the original bill of complaint in this suit.

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That, in pursuance of the agreement, the two parties personally appeared before the said Fisher, and submitted to him for his arbitration and decision the question and their respective claims in reference thereto, and their said patents; and that the parties having been fully heard by him, Fisher thereupon, afterward, to wit, on the 21st day of January, 1871, made and published his decision and award therein, wherein he found and decided, that the machine manufactured by the defendant *was not an infringement of the letters-patent No.* 78,829, granted to Reedy, June 9th, 1868; a copy of which decision, finding, and award was thereupon immediately by the said Fisher delivered to each of the parties.

Instead of demurring to this plea or tendering an issue to its allegations, the complainant had leave of the court to file, and did file, a *second* supplement to his original bill and an amendment to his first supplement. The substance of it all was, that the complainant, after the filing of his original bill, on the 20th of January, 1871, at the request and suggestion of the defendant, accompanied him (the defendant) to the office of Mr. Fisher, for the purpose of hearing the opinion of the said Fisher upon the question of infringement stated in the said bill; that, after a statement of the complainant's claims under his original patent, it was agreed between the parties to submit in writing the whole question of said infringement for the opinion of Fisher; that Fisher then drew an agreement in writing which the complainant and the defendant signed, but which the complainant did not understand as making the farther prosecution of this suit dependent on the opinion so to be given; that the complainant executed the agreement without consulting his solicitors, and without knowing its effect; that as soon as he became advised of the nature of the agreement and its possible effect, on the morning of the 21st day of January, 1871 (the agreement having been executed in the evening of the previous day), he went to the office of Fisher for the express purpose of revoking any and all authority given to him by the said agreement, but that Fisher was not in his office, and the complainant was informed that he would not

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be in the city until late in the afternoon; that the complainant then took away from Fisher's office the original letters-patent, and did not return them; that in the afternoon of the said 21st day of January, 1871, and before the making or signing of the pretended award hereinafter mentioned, the complainant saw Fisher at his office and explained to him that he (the complainant) was mistaken as to the nature and effect of the agreement, and that he did not wish him, the said Fisher, to act thereunder, and, at the same time, served him, Fisher, with a written notice revoking all authority and power given to him by the agreement; that, notwithstanding such revocation and the withdrawal of the letters-patent, which were the only evidence of the complainant's invention before him, Fisher proceeded in the matter of said reference, and afterward made and delivered an opinion with respect to the infringement by the defendant of the first claim of the letters-patent, but did not give any opinion or make any award as to the second claim (for an infringement of which, as well as of the first, this suit was brought), and did not award, adjudge, or direct anything to be done by either of the parties; that the complainant did not receive notice of the sittings of the said pretended arbitrator, nor was any opportunity given him to call witnesses, or to be heard in person or by counsel; and that it did not appear that the machine of the defendant was before Fisher, or that any evidence respecting the same was offered or by the said Fisher required.

Prayer as in the bill and first supplement. Verification in due form.

June 14th, 1871, the defendant again pleaded, with an answer in support of his plea.

This plea and answer was, that it was not true that the complainant signed the agreement to submit not understanding the same to make the further prosecution of said suit dependent on the decision of Fisher; and, on the contrary, that the complainant signed the same with full knowledge and perfect understanding of the effect thereof, and, particularly, that the very purpose of signing the same was to put

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an end to this suit. And that it was not true that the complainant revoked the authority of Fisher, given him by the said agreement, before Fisher had made and published said decision and award. Nor true that the complainant did not receive notice of the sittings of the arbitrator, and that no opportunity was given the complainant to call witnesses or to be heard in person or by counsel; but, on the contrary, that the complainant was personally present before the arbitrator at all his sittings, and had full opportunity to and did in fact produce and offer all evidence he considered material to his claim, and was fully heard thereon by said arbitrator.

Verification in due form, June 7th, 1871.

On the 12th October, 1872, a motion to strike out the plea and the answer, "for insufficiency," was overruled, and on the 6th March, 1873, an order for the taking of testimony made.

The testimony of Mr. Fisher was taken, and showed that the allegations of Reedy's so-called second supplement were not in their essential points true; and, on the contrary, that the pleas and answer of the defendant in such points were. It showed also that on the 21st of January, 1871, that is to say, one month before the reissue, Mr. Fisher had made an award thus:

"The question presented by the agreement of the parties to me for decision as referee, is whether the machine manufactured by Scott is or is not an infringement of the letters-patent No. 78,829, for an improvement in hoisting machines, granted to Reedy, June 9th, 1868.

"The patent embraces two claims, but the controversy as to infringement is, by agreement, limited to the first, which reads as follows:

"'The combination, substantially as described, with a hoisting platform of the suspending-rope, weights, rollers, sheaves, and shaft, or their mechanical equivalents, by which the platform is both balanced and enabled to be elevated and depressed in the manner explained.'

"The mechanism involved in this claim may be briefly described as follows: The platform of an ordinary hoisting ma-

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chine is suspended in the bight of a long rope, about at mid-length of the latter. The two ends of the rope pass up, one on each side of the hatchway to a sheave, the two sheaves being secured to the same horizontal shaft, which is caused to rotate by gearing, after passing over the sheaves each end of the rope described, and is attached to a weight or counterpoise. At the point where the rope passes under the platform a small roller is located, one on each side, to prevent the abrasion of the rope as it is drawn backward or forward. The rope may be caused to move under the platform by irregularities in the load or by one sheave taking up the rope faster than the other; and the purpose of passing the rope below the platform and of making provision to prevent its abrasion is, that by using the rope in this way the platform is more perfectly balanced under all conditions. Hence, the claim describes the mechanism not only as raising and depressing the platform, but as 'balancing' it; and it is in the performance of this latter function that the rollers play their especial part.

"The machine of Scott shows a platform hung in the bight or loop of a rope which passes under a beam directly over the centre of the platform, with which it is connected by two side stanchions. The ends of the rope are taken up to two sheaves on the same horizontal shaft, over which they pass, descending over two idle pulleys on one side of the machine to a single weight, to which both ends are fastened. At the point at which the rope passes under the beam of the platform there is a grooved metallic saddle, which holds up the ends of two levers which operate the safety-brake; the rope passes in the groove around this saddle, and in fact suspends the saddle in the loop or bight.

"In my judgment, in so far as the function of elevating or depressing the platform by means of two ropes passing over two sheaves, and attached to weights is involved in Reedy's claim of invention, the same function is performed in substantially the same way by the mechanism in Scott's machine. But Reedy's claim is not for the mechanism for elevating and depressing the platform disconnected from that for balancing it. On the contrary, the mechanisms for performing the two functions are claimed in combination and not otherwise.

"It is well-settled law that a patent for a combination is not infringed unless all the parts of the combination are used by the alleged infringer. He must use every element enumerated

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Statement of the case.—A reissue advised by Mr. Fisher.

or must substitute a substantial equivalent for those omitted. The cases upon this subject are all one way.*

"After careful examination I do not think that Scott uses the rollers, or any equivalent for them. His rope does not pass under the platform. As the ends are not attached to separate weights, but to the same weight, there is no movement of the rope. It does not play any part in balancing the platform, which is simply suspended as from a single central point. He does not use a roller, but a grooved piece of metal; and while it is true that such a curved piece of metal, placed in the same place as the roller, and aiding the rope in balancing the platform by diminishing the friction, would probably be an equivalent for the roller, yet I am clearly of opinion that, used as it is in Scott's organization, merely to inclose and sustain the ends of the brake-levers and performing no part in balancing the platform or in preventing the abrasion of the rope, it is not an equivalent of the rollers. It follows that Scott has omitted a material element of the combination patented to Reedy, and, consequently, has not infringed his patent.

"I therefore find, in answer to the questions submitted to me, that the machine manufactured by Scott is not an infringement of the letters-patent No. 78,829, for an improvement in hoisting machines, granted to Reedy, June 9th, 1868.

"S. S. FISHER,
"Referee."

"January 21st, 1871.

Mr. Fisher's cross-examination showed still further that after making this award Reedy consulted him professionally, and that he, Fisher, understanding the controversy with Scott to be terminated, advised the surrender and reissue of the patent, and that an application was made and reissue obtained through his (Mr. Fisher's) office, Mr. Fisher drawing the claims; and that he "advised Mr. Reedy that a reissue would cure the defect that had prevented him from covering Scott's machine, and secure to him what appeared to be his real invention."

The decree was thus:

* Prouty v. Ruggles, 16 Peters, 336; Vance v. Campbell, 1 Black, 427; Crompton v. Belknap Mills, 3 Fisher, 536.

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Argument for the appellant.

"This cause came on for hearing upon the complainant's bill and supplemental bill and the plea of the defendant thereto, the bill of complaint by way of amendment and further supplement, and the plea of the defendant and answer in support of the same to the said bill, exhibits, and testimony, and was argued by counsel. And thereupon the court, being fully advised thereon, find that the plea is true and sufficient, and that the equity of the case is with the defendant. It is thereupon ordered, adjudged, and decreed that the bill and the supplemental bill and bill by way of amendment and further supplement thereto be and the same are hereby dismissed," &c.

The errors now assigned were—

1. That the court below held the plea of the defendant to be true and sufficient with respect to the matters alleged *in the supplemental bill.*

2. That it found the equity of the cause, with respect to the matters alleged *in the supplemental bill*, to be with the defendant.

Mr. G. E. Pugh, for the appellant:

1. The original bill related simply to the rights secured by the original patent; that is to say, patent No. 78,829, dated June 9th, 1868. Reedy, the complainant, alleged that Scott, the defendant, infringed *that* patent. Whether he infringed the reissued or *new* patent, that is to say, patent No. 4273, was not a question.

The reissued patent had not then any existence. It was in this state of things that whatever submission was made to Mr. Fisher was made.

Of course the complainant's rights under the reissue were not within the terms of the submission, and the opinion and award of Mr. Fisher have no reference to it. Indeed, it was only after the award and in consequence of it that a reissue was applied for. To construe an award on one matter existing and submitted, at one time, in such a manner as to make it apply to another matter which at the time was non-existent and not submitted, is plain error.*

* Hill v. Thorn, 2 Modern, 309.

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Argument for the appellant.

The rights of Reedy under the reissued patent come in question only on the supplemental bill. For when the reissue of the original patent took place, the original patent itself became null.* In point of fact it was surrendered and cancelled. The practice of the Patent Office requires that it should be. The original suit, and all questions and all proceedings under it, fell therefore to the ground.

The case, then, is on the supplemental bill. That bill first raised the question on the new patent, rights under which, as we have said, were never submitted to Mr. Fisher, and by any submission made at the date when the only one here set up was made, could not, in the nature of things, have been submitted. Yet the plea would seek to set up that by the arbitration and award Reedy's rights under the reissue were concluded. When the court below found that the plea of the defendant was sufficient with respect to matter alleged in the *supplemental bill*, it surely made error.

It is no answer to say that the reissue is alleged to have been "for the same invention" as the original patent. Of course it was. But it was for the same invention particularly, properly, and validly set forth and described, and not for the invention generally, improperly, and invalidly set forth and described. And while, of course, the reissue could not lawfully include an invention beyond the scope of the original letters-patent, it does not follow that an omission to claim, with entire distinctness, what the tenor of the specification shows to have been the "real invention" of the patentee, and what it sufficiently appears he *intended* to claim, must be remediless forever. The very object of the statute in permitting letters-patent to be surrendered, and to be again issued, upon an amended specification, is to provide for such a case.†

At all events, the validity of the reissue ought to be determined upon a question *directly* made.‡

* Moffitt v. Garr et al., 1 Black, 282.

† Battin v. Taggert, 17 Howard, 74; Rubber Co. v. Goodyear, 9 Wallace, 788.

‡ Stimpson v. West Chester Railroad Co., 4 Howard, 380; Klein v. Russell, 19 Wallace, 433, 434.

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That the whole decision of Mr. Fisher rests on defect of a specification—a failure in Reedy to describe his invention with sufficient certainty—is shown by the fact that Mr. Fisher himself, after his award and in consequence of it procured the reissue, he advising Mr. Reedy that a reissue would cure the defect that had prevented him from covering Scott's machine and secure to him what appeared to be his real invention. And that the difference between the claim in the original patent and the claim in the reissue was meant to be insisted on by us below, is shown by our cross-examination of Mr. Fisher, where it is brought out and made plain by us that that gentleman, when acting as arbitrator, must have rested his award upon a defective specification.

2. Mr. Fisher was to take the place of the judges of the Circuit Court as to the particular "question" submitted; and from his decision there was to be no appeal.

That has been accomplished. The letters-patent No. 78,829, have been surrendered; and every cause of action or complaint, *arising under them*, has been abandoned.

Nothing in the submission shows that Scott was to abandon his letters-patent No. 81,299, "for an improvement in elevators," dated August 18th, 1868, nor that he should "make no more" hoisting machines. But, only, that he should forbear to make *such* machines, without license, as embraced the invention of Reedy described in the "aforesaid" letters-patent.

No opposing counsel.

Mr. Justice CLIFFORD delivered the opinion of the court, and after stating the case and making some general remarks proceeded as follows:

The following assignment of errors is the assignment made:

1st. That the Circuit Court erred in holding that the plea of the respondent was true and sufficient with respect to the matters alleged in the supplemental bill.

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2d. That the said court erred in finding that the equity of the case with respect to the matters set forth in the supplemental bill is with the respondent.

In the case before us all necessity for any discussion of the charges contained in the original bill of complaint is superseded, as the assignment of errors does not impugn in that respect or call in question the correctness of the decision or decree of the Circuit Court. Such an assignment of errors, if it had been filed, would have been utterly unavailing, for the reason that the surrender of a patent to the commissioner within the sense of the provision, means an act which, in judgment of law, extinguishes the patent. It is a legal cancellation of it, and hence the patent can no more be the foundation for the assertion of a right, after the surrender, than could an act of Congress which has been repealed, and it has frequently been determined that suits pending which rest upon an act of Congress fall with the repeal of it. Antecedent suits depend upon the patent existing at the time they were commenced, and unless it exists and is in force at the time of the trial and judgment, the suits fail.*

Where the patent expires and is extended pending the litigation, and the infringement by the respondent is continued in respect to the extended patent, a supplemental bill is a proper pleading to prolong the suit, as in that state of the case the complainant may well claim, if he is the original and first inventor of the improvement, to recover of the respondent the gains and profits made by the infringement, both before and subsequent to the extension, but the rule is otherwise where the original patent is surrendered, as the effect of the surrender is to extinguish the patent, and hence it can no more be the foundation for the assertion of a right than can a legislative act which has been repealed without any saving clause of pending actions. Consequently the infringement of the reissued patent becomes a new cause

* Moffitt v. Garr, 1 Black, 278; Curtis on Patents, §§ 899, 342.

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of action for which, in the absence of any agreement or implied acquiescence of the respondent, no remedy can be had except by the commencement of a new suit.

Instances, however, may be found where in such a case the complainant sought his remedy in a supplemental bill, no objection having been made by the respondent, and such examples induce the court to disregard the irregularity in this case, inasmuch as neither the respondent or the court below appear to have regarded it as a matter of any importance. Instead of that the complainant was permitted to file his supplemental bill charging infringement as in case of an extended patent, and the respondent making no objection to the regularity of the bill, refiled the plea which he filed to the original bill of complaint, accompanied with a general denial of every material allegation contained in the supplemental bill, as subsequently amended by leave of the court. Subsequently the proofs exhibited were taken, and the parties having been heard the court entered the aforesaid decree deciding the whole case, as more fully set forth on the record. None of the proofs were taken before the reissued patent was granted, nor until after the supplemental pleadings were completed.

These suggestions are sufficient to show that every irregularity, whether on the one side or the other, was waived before the decree of the Circuit Court was entered, and that both parties understood that the question submitted to the arbitrator was whether the machine manufactured by the respondent infringed the improvement invented by the complainant. Conclusive support to that proposition is found in the fact that both parties proceeded, throughout the trial in the Circuit Court, upon the legal ground that the reissued patent was for the same invention as that embodied in the original patent.

Reissued patents are required by law to be for the same invention as that secured by the surrendered patent, and the complainant expressly alleges in this case that his reissued patent is for the same invention as the surrendered original. Nor can the court take any other view of the

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case, as neither the original nor the reissued patent is made a part of the record. Clear proof is exhibited that the agreement to arbitrate and the submission in form were both executed before the original patent was surrendered, and that the submission had been signed and delivered before the complainant made any effort to revoke the instrument.

Sufficient has already appeared to show that the arbitrator examined the question submitted to him, and made an award that the machine manufactured by the respondent did not infringe the invention secured to the complainant in his original patent, and that he gave his reasons for the conclusion, which appear to be satisfactory as far as can be ascertained without the means of comparing the patent of the complainant with the machine of the respondent. Such a comparison cannot be made without such means, nor can the court look out of the record for means to make the comparison.

Attempt is made to avoid the force and effect of the award of the arbitrator, upon the ground that the complainant was misled in signing the agreement and that he was deprived of the opportunity to summon witnesses and to be heard in person or by counsel, but it will be sufficient to say in response to those suggestions that the proofs exhibited do not satisfactorily sustain the charges. On the contrary, enough appears to convince the court that the agreement is obligatory and that the complainant is bound to execute the agreement and to dismiss his bill of complaint and not to molest the respondent in the manufacture of his machine.

Substantial doubt cannot be entertained that the rule of decision adopted by the arbitrator is correct if he properly construed the patents. He found that the patent of the complainant was a combination of old ingredients, and that the machine manufactured by the respondent did not contain all of the ingredients embodied in the combination patented by the complainant. Nothing is exhibited in the record to show that the arbitrator erred in the construction of the patent, and if he did not, and his finding as to the

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character of the machine manufactured by the respondent is correct, it is settled law that his decision is correct.*

Arbitrators as well as courts are presumed to decide correctly until the contrary appears, and if the party desires that the decision of such a tribunal shall be re-examined by an appellate court he must see that the means for such a review is embodied in the record. Neither the patent of the complainant nor any authentic description of the machine manufactured by the respondent is contained in the record, and in the absence of such it must be presumed that the arbitrator construed the patent correctly, and that his finding in respect to the construction and mode of operation of the machine manufactured by the respondent is also correct.

Judging from the character of the assignment of errors it is presumed that none of these views as applied to the matters alleged in the original bill are controverted, and the court here is of the opinion, in view of the previous explanations, that they are equally applicable to the matters alleged in the supplemental bill, for several reasons:

1st. Because the agreement to arbitrate and the submission in form were duly executed before the original patent was surrendered.

2d. Because the arbitrator proceeded to examine and to decide the question submitted without any objection from either party growing out of the surrender or reissue.

3d. Because the subsequent pleadings and proceedings in the suit show that the surrender and reissue did not have the effect to change the substantial issue in the litigation.

4th. Because the complainant alleged in his supplemental bill that the reissued patent was for the same invention as that embodied in the original.

5th. Because the agreement to dismiss the bill of complaint, if executed by a proper decree, must include all the subsequent appendages to it and would be of itself a decision adverse to the complainant.

DECREE AFFIRMED.

* Gill v. Wells, 22 Wallace, 1; Gould v. Rees, 15 Id. 194; Vance v. Campbell, 1 Black, 428; Prouty v. Ruggles, 16 Peters, 341; Carver v. Hyde, 16 514; Brooks v. Fiske, 15 Howard, 212; Stimpson v. Railroad, 10 Id. 329.

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Statement of the case.—The old case.

SMITH v. ADSIT.

Where a complainant alleging himself to be a *bonâ fide* purchaser, and setting out a case in the highest State court for equitable relief against a sale to other parties which an owner of land had undertaken to make, alleged that the party in making such second sale had violated an act of Congress which made such sale void, and that the purchaser knew this; and alleged also that the sale was made through fraud and imposition on the vendor, with a prayer that the purchaser at such second sale might be held a trustee for the complainant—if, in such case, the court, holding that there was no fraud and no trust proved, dismiss the bill *in consequence* of that want of proof, and consequently for want of equitable jurisdiction, the fact that it says: "The most that can be said is that the transaction was in violation of an act of Congress, but that would not give a court of chancery jurisdiction to hold the second purchaser a trustee and make him accountable as such," does not show that there has been drawn in question the construction of a statute of the United States, and that the decision has been against the title or right set up or claimed by the complainant under such statute. The case rested on the fact of a trust proved, and on the extent of the State court's equitable jurisdiction; matters not the subject of review under section 709 of the Revised Statutes, the 25th section of the Judiciary Act of 1789. The case, which was between the same persons as those mentioned in *Smith v Adsit* (16 Wallace, 185), held to be undistinguishable from that one.

ON motion to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of the State of Illinois; the case being thus:

An act of Congress of February 11th, 1847, providing for raising a military force for a limited time, enacted that a bounty in the form of one hundred and sixty acres of land, to be located by the warrantee, should be given to soldiers honorably discharged, but provided "that all sales, mortgages, *powers*, or other instruments of writing going to affect the title or claim to any such bounty right, made or executed prior to the issue of the warrant or certificate, should be null and void to all intents and purposes whatever."

With this statute in force Smith filed a bill in one of the inferior State courts of Illinois, against Adsit, Wright, Rourk, and certain trustees of schools, charging that in

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1850, by conveyance from one Holmes, he, Smith, became the owner of certain lands described. The bill averred that Holmes had been a soldier in the Mexican war, that he received a certificate of service and of honorable discharge, entitling him, under the acts of Congress, to a land warrant, and that he applied to Adsit to procure the warrant for him; that Adsit prepared the necessary papers, and at the same time made out a power of attorney for Holmes, authorizing the assignment of the land warrant about to be obtained, with blank spaces for its date, for the number and date of the warrant, and for the name of the attorney, and that he fraudulently induced Holmes to sign it; that this power of attorney was filled up subsequently, and after the land warrant was obtained, with the name of one Hoard as the attorney, with the number and date of the warrant issued (No. 23,129, date August 18th, 1848), and with August 30th, 1848, as the date of the power. The bill further charged that Adsit then procured the attorney to assign the warrant to him, that he located it and obtained for the land a patent in his own name, as assignee of Holmes; that at the date of the power Holmes was a minor, and that the defendants, Wright, Rourk, and the school trustees, hold the land under conveyances from Adsit, with notice of the plaintiff's rights. that the power of attorney was a nullity because obtained by fraud, and because of the minority of Holmes; and it averred that if any sale was made by him to Adsit of the land warrant, it was in fact made before the warrant was issued, that it was therefore null by force of the act of Congress, and that consequently Adsit held and located the warrant as a trustee for Holmes, and that the purchasers from him were chargeable with the same trust.

The prayer of the bill was that Adsit might be decreed to have acquired the lands in trust for Holmes; that the other defendants might be decreed to have purchased them, and to hold them charged with the same trust; that an account should be directed, and also a conveyance to the plaintiff as assignee of Holmes. There was also a prayer for general relief.

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Statement of the case.—The old case.

The answer of Adsit, *responsive to the bill*, fully denied the fraud charged, and averred that he purchased the land warrant from Holmes, without any agreement to act as his agent; and the other defendants set up that they were *bonâ fide* purchasers from Adsit, without notice of any equity in Holmes. Both Holmes and Adsit were examined as witnesses. Holmes swore to matters showing a trust; Adsit swore that the matters thus sworn to were false.

The court in which the bill had been filed entered a decree against Adsit for $6829, and dismissed the bill as to the other defendants. Adsit then appealed to the Supreme Court of the State, where the decree against him was reversed, and the bill dismissed as to him, *for want of jurisdiction;* nothing further appearing—that is to say, no reason or exfoliation of the grounds of the decree being given. From that decree Smith, the complainant, appealed to this court, under an assumption that the case came within section 709 of the Revised Statutes (the 25th section of the Judiciary Act of 1789, or the act of February 5th, 1867, amendatory of it), and that a title, right, or privilege under a statute of the United States, had been specially set up and claimed by him and decided against by the Supreme Court of the State.*

But this court dismissed the writ. It said:

"We do not perceive that we have any authority to review the judgment of the State court. Plainly, if there be any Federal question in the case it is because the plaintiff claimed some title, right, privilege, or immunity under the act of Congress to which reference was made in his bill, and because the decision of the court was against the title, right, privilege, or immunity thus set up or claimed. Such a claim and such a decision must appear in the record. But we think this does not appear. It must be admitted that the question whether the sale of the land warrant by Holmes to Adsit, if made before the warrant issued, as charged in the bill, was not a nullity, may have been presented, but it does not appear that such a question was de-

* For the exact language of the acts referred to, and in the main sufficiently familiar to the profession, see Appendix.

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cided, much less that it was decided adversely to the plaintiff in error.

"The bill was dismissed for want of jurisdiction. The judgment of the court respecting the extent of its equitable jurisdiction is, of course, not reviewable here. The record does not inform us what other questions, if any, were decided. It nowhere appears that the sale from Holmes to Adsit was ruled to be valid, notwithstanding the act of Congress which declared that sales of bounty-rights, made or executed prior to the issue of land warrants therefor, shall be null and void. Nor was it necessary to the decree that was entered that such a decision should have been made. After the land had been sold by Adsit to *bonâ fide* purchasers without notice, which had been decreed in the court below, from which decree there was no appeal—after it had thus been settled that there was no continuing trust in the land—it may well have been determined that the plaintiff's remedy against Adsit was at law, and not in equity, even if the sale from Holmes to him was utterly void. But whatever may have been the reasons for the decision, whether the court had jurisdiction of the case or not, is a question exclusively for the judgment of the State court."

Smith, the complainant below, now brought the case here on a new writ. In the present instance a revision of the statutes of Illinois by its legislature, made A.D. 1874, having enacted that the opinion of the court should be a part of the record of every case, the opinion below was made part of the record, which it had not been when the case was here below, A.D. 1872. This opinion said:

"There is no evidence of a trust or of fraud on the part of Adsit, his testimony balancing that of Holmes on that point. Nothing, therefore, is left of the case but the fact of obtaining, by Adsit, Holmes's discharge, and procuring thereon a warrant to be issued for the land in controversy. *The most that can be said of this is that the transaction was in violation of an act of Congress, but that would not give a court of chancery jurisdiction to hold Adsit as a trustee and make him accountable as such.*

"None of the matter alleged, of trust and of fraud, has support in the testimony; nothing appears to corroborate Holmes's statements, and they being denied by Adsit, the one is as much

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entitled to belief as the other. *There is nothing, then, in the record sufficient to give a court of chancery jurisdiction of the subject-matter; there being no fraud and no trust established.* Consequently the decree finding a trust existed must be reversed, and the bill must be dismissed.

"If Holmes has any right to the money Adsit received for the land, he can prosecute that right in a court of law, and recover according to the justice of his case.

"DECREE REVERSED."

Mr. W. J. Burgess, for the plaintiff in error and in support of the jurisdiction:

The statutes of the State of Illinois* make the opinion of the court part of the record.

Does that record thus composed present the question necessary to give this court jurisdiction? Has a right claimed under a statute of the United States been denied by the Supreme Court of the State? That one has been, appears from the record; from the language of that court used twice. First that court said:

"Nothing is left of the case, but the fact of obtaining by Adsit Holmes's discharge, and procuring thereon a warrant to be issued for the land in controversy. The most that can be said of this is, *that the transaction was in violation of an act of Congress.*"

And then that court denied the relief which the plaintiff, by reason of that act, claimed as entitled to. It said:

"That would not give a court of chancery jurisdiction to hold Adsit as a trustee, and make him accountable as such."

Holmes set up, under the act of Congress referred to in the bill of complaint, that he was entitled to the land. The legal title Adsit had acquired from the United States. He transferred it to other parties before he obtained his patent upon the papers as they existed in the land office. These papers, and the patent when issued, advised all parties, claiming under them, that the sole right in Adsit in this land, was

* Revised Statutes, 1845, § 19, p. 144; Revision of 1874, p. 829.

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as the assignee of Holmes, under a land warrant, issued to Holmes and assigned to Adsit under the power of attorney. *That power was simply void by the act of Congress set up in the bill.* Holmes so claimed it, and assigned the land to Smith, the complainant, and the plaintiff in error, who avers in his bill that by reason of that violation he is entitled to the legal title and a conveyance of the land from the parties who had derived that legal title from Adsit, with notice. Whether the facts will sustain the right as set up is one thing; but a right under an act of Congress is specifically made in the pleadings of this case, and the decision of the State court is *in totidem verbis* against that right. So that we have alike in the pleadings and in the judgment of the court, this vital question both raised and denied of record.*

Mr. Thomas Wilson, contra, and against the jurisdiction, contended that the case was essentially the same as when before the court in 1872, and that the sentence relied on from the opinion did not change it; that the court below had decided that no trust was proved; and, of course, that there was nothing for a chancellor to act on. That whatever might have been said *en passant* or adjectitiously, this was the ground on which the judgment below was rested.

Mr. Justice STRONG delivered the opinion of the court.

We do not perceive that this case differs essentially from what it was in 1872, when it was dismissed for want of jurisdiction in this court to hear it. In the Supreme Court of the State it was an appeal from an inferior court, in which it had been sought to enforce an alleged trust, by a bill in equity, and the bill was ordered to be dismissed, because the court was of opinion no trust was proved. The record does not show that the question whether the sale of the land warrant was a nullity if made before the warrant issued, was passed upon, much less that it was decided against the complainant. The decree ordering the bill to be dismissed must

* Bridge Prop. v. Hoboken, 1 Wallace, 116; Brooks v. Martin, 2 Id. 86.

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have been made, if it had been decided that the sale was void. Even then it would have been necessary to establish the existence of a trust. What amounts to a trust, or out of what facts a trust may spring, are not Federal questions, and on a writ of error to a State court we can review only decisions of Federal questions. The case is covered by *Smith* v. *Adsit*, in 16 Wallace.

WRIT OF ERROR DISMISSED.

SMYTHE v. FISKE.

Under the Tariff Act of July 30th, 1864 (13 Stat. at Large, 210), "silk ties" are chargeable with a duty of 50 per cent. *ad valorem*. They fall under the closing words of the eighth section of that act which enacts "that on all manufactures of silk, or of which silk is the component material of chief value, *not otherwise provided for*, 50 per cent. *ad valorem*," shall be charged. The words "not otherwise provided for," mean not otherwise provided for by previous parts of the section of which they make the closing words; and so exclude reference to the acts of 1861 and 1862, which laid a duty of but 35 per cent. on "articles worn by men, women, or children, of whatever material made."

ERROR to the Circuit Court for the Southern District of New York; in which court Fiske sued Smythe, collector, in December, 1868, to recover money alleged to have been illegally exacted by the said defendant, as collector, for duties upon imports.

The things in respect to which the duties were exacted were *silk neck-ties*, imported in October, 1868.

The collector had exacted a duty of 60 per cent. upon them, against the payment of which the defendant *protested*, because, as he alleged, silk neck-ties were liable to a duty of but 35 per cent.

It was shown in evidence that the neck-ties in question were made of silk, folded and ironed, turned over and pressed by hand, the ends being afterwards stitched; that

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they were known in trade and commerce as "silk ties," and never as "scarfs" or as articles of ready-made clothing.

The true decision of the question depended upon the right interpretation of certain acts of Congress, referred to and relied on by the two parties respectively. The enactments referred to are as follows:

The twentieth section of an act of August 30th, 1842,* after laying duties on a large number of enumerated articles, thus enacted:

"There shall be paid on every non-enumerated article which bears a similitude, either in material, quality, texture, or the use to which it may be applied, to any enumerated article chargeable with duty, the same rate of duty which is charged on the article which it most resembles in the particulars mentioned. If any non-enumerated article resembles equally two or more enumerated articles on which different rates of duty are chargeable, there shall be paid on such article the rate of duty chargeable on the article it resembles paying the highest duty; and on all articles manufactured from two or more materials, the duty shall be assessed at the highest rate at which any of its component parts may be chargeable."

An act of July 30th, 1846,† imposed a duty of 30 per cent. *ad valorem* upon the articles of merchandise specified in a schedule annexed to it, and embracing among other things,

"*Articles worn by men*, women, or children, of whatever materials composed, made up or made wholly or in part by hand, not otherwise provided for."

An act of May 2d, 1861,‡ imposed a duty of 30 per cent. upon the articles therein enumerated. Among them were "articles worn by men," &c., as specified in the act of 1846, and described in the same terms. Another section enacted that upon certain specified articles of silk (neck-ties not being among them), and upon

"All other manufactures of silk or of which silk shall be the component material of chief value, a duty of 30 per cent. *ad valorem* shall be paid."

* 5 Stat. at Large, 565. † 9 Id. 42, § 1. ‡ 12 Id. 191, § 22.

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By an act of July 14th, 1862,* an additional duty of 5 per cent. was imposed upon "articles worn by men," &c., repeating the language of the act of 1846 in describing them.

Up to this date it seemed to be admitted that silk neckties would pay but 30 or 35 per cent. at most. However, on the 30th July, 1864, Congress passed another act, an act entitled "An act to *increase* duties on imports, and for other purposes."

This act, though not in substitution of all prior acts laying duties on imports, was, nevertheless, an act which went over a great field of duties on imports, and laid a vast number of duties in lieu of former ones. It covered sixteen pages of the statute-book, and had in it twenty-nine sections.

Teas, sugar, confectionery, molasses, brandy, spirits, cordials, liquors, bay rum, wines, ale, porter, beer, cigars, snuff, tobacco, iron, tin, steel, copper, lead, and zinc of many different sorts and differently fabricated; diamonds, wool, and manufactures of wool, sheepskin, carpets and carpeting, women's dress goods, shirts, drawers, hosiery, manufactures of worsted and cotton, cotton velvet, linens, and manufactures of flax, spun silk, earthenware, stoneware, and china, slates, clay, glass, a large variety of drugs, bristles, lemons, pepper, salt, books, gunpowder, mineral water, marble, soap, and several other articles were all affected by its provisions.

This act of July 30th, 1864, by its eighth section thus enacted:

"SECTION 8. In lieu of the duties heretofore imposed by law, on the articles hereinafter mentioned, there shall be levied, collected, and paid on the goods, wares, and merchandise enumerated and provided for in this section, imported from foreign countries, the following duties and the rates of duty, that is to say—

"On spun silk for filling in skeins or cops, 25 per centum *ad valorem*. On silk in the gum, not more advanced than singles, tram, and thrown on organzine, 35 per centum *ad valorem*. On floss silks, 35 per centum *ad valorem*. On sewing silk in the gum or p[illegible]rified, 40 per centum *ad valorem*. On all dress and

* 12 Stat. at Large, 543, § 13.

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piece silks, ribbons, and silk velvets, or velvets of which silk is the component material of chief value, 60 per centum *ad valorem*.

"On silk vestings, pongees, shawls, *scarfs*, mantillas, pelerines, handkerchiefs, veils, laces, shirts, drawers, bonnets, hats, caps, turbans, chemisettes, hose, mitts, aprons, stockings, gloves, suspenders, watchchains, webbing, braids, fringes, galloons, tassels, cords, and trimmings, 60 per centum *ad valorem*.

"*On all manufactures of silk* or of which *silk is the component material of chief value*, NOT OTHERWISE PROVIDED FOR, 50 per centum *ad valorem*."

In addition to this act of 1864, an act of 1865* laid a duty of 60 per cent. "on ready-made clothing of silk, or of which silk should be a component part."

The view of the importer, the plaintiff in the case, was that "silk ties" were plainly within the terms "articles worn by men, women, and children," and, therefore, plainly and specifically provided for by the acts of 1861 and 1862, imposing the first, 30 per cent., and the second, a 5 per cent. additional.

The collector apparently considered the act of July 30th, 1864, as a new tariff system so far as rates of duties were concerned, and finding "silk scarfs" enumerated and taxed at 65 per cent., while "silk ties" were not enumerated, and assuming that "silk ties" bore a closer similitude to silk scarfs than to anything else, went back and availed himself of the twentieth section of the act of August, 1842, which fixed on every non-enumerated article which bears a similitude in material, quality, or texture, or to the use to which it may be applied, to any enumerated article, chargeable with duty, the *same rate of duty* which is charged on the article which it most resembles in the particulars mentioned. He was ready also to assert that they were "ready-made clothing of silk," and so taxable under the act of 1865 with 60 per cent.

It might be, however, that neither the view of the importer nor that of the collector was a right one, and that there might be yet a third view differing from both.

* Act of March 3d, 1865, § 3, 13 Stat. at Large, 488.

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The question about this third view arose on the concluding words of the eighth section, above quoted, of the act of July 30th, 1864, in these words:

"On all manufactures of silk or of which silk is the component material, *not otherwise provided for.*"

What was the meaning of these italicized words? Was the act of 1860 a complete tariff act as to silk, and did they mean not provided for by preceding parts of the section of which they made the closing words, or was the act only additional to former tariff acts about silk, and did they mean not provided for by former *acts?*

This, as already said, was a third and new question, and according as it was answered in one way or in the other, the judgment obviously was to be with the importer or with the collector.

The court below in charging the jury said:

"When Congress provided in respect to articles non-enumerated, but yet similar to those which are enumerated, they did not mean simply and only to provide for articles that are specified by name, but they meant to provide for articles that did come within a specific designation found in existing laws. They foresaw, or perhaps had learned, that with the utmost care and painstaking of the legislature to provide for duties upon goods in various classes, in such classification as they deemed the interest of the country required, there would nevertheless appear occasionally goods which could not be assigned a place in the law by any designation which had been employed. I think this act of 1842 meant to provide for that class of cases in which goods were imported, in respect to which in no terms of enumeration could there be found a clause in the statute that was apt to describe them; that any such goods should be classed with those to which they bore similitude in kind, quality, and use, and that, therefore, when Congress adopted a designation, distinct and explicit, which embraced a particular article, then this section in the act of 1842 had no application to it; so that I am not able to adopt the views of the counsel for the government in this case. I, therefore, dispose of the case upon my view of the construction of the act under which the duty was imposed.

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That provides that, on and after the day and year aforesaid, in lieu of duties heretofore imposed by law on the articles hereinafter mentioned, there shall be levied, collected, and paid on the goods, wares, and merchandise enumerated and provided for in this section, imported from foreign countries, the following duties and rates of duties; that is to say, among other things, upon silk vestings, pongees, shawls, scarfs, handkerchiefs, and various other things. Now, if, upon the evidence, silk ties are not included in that enumeration of shawls, scarfs, mantillas, handkerchiefs, veils, and laces, then ties are not among the articles in that part of the section mentioned, and I do not understand the counsel for the government to insist that they are.

"Then follows: '*On all manufactures of which silk is the component material of chief value, not otherwise provided for*, 50 *per cent.*'

"Now, had this statute of July 30th, 1864, been a statute which purported to cover the whole subject—if it purported to be an entire revision of the whole law relating to duties on imports, and had, either by express words or by implication, repealed previously existing laws, there would have been no room to doubt that 'not otherwise provided for' meant not otherwise provided for in this act. Counsel for the government insists that the intention to give those words that construction is apparent on reading the entire section. I am not satisfied that that is so. The act is specific. In most or all of its provisions it appears to have been a taking up of the tariff laws, and on a review of them, a selecting in various classes the articles which are here enumerated or embraced, and anew defining the duties upon them, and the language 'any manufacture of silk, or of which silk is a component material of chief value, not otherwise provided for,' in my judgment means not otherwise provided for in this or any other act.

"Entertaining that view of the construction of the statute, if these goods are not ready-made clothing, and that is not strenuously insisted upon, and if they are not scarfs, then, for the purpose of this trial, I must say that the plaintiff is entitled to recover the amount which he claims."

To which charge defendant's counsel excepted, and verdict and judgment having been given for the plaintiff, the collector brought the case here.

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Mr. S. T. Phillips, Solicitor-General, for the plaintiff in error; Mr. Edward Hartley, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

A thing may be within the letter of a statute and not within its meaning, and within its meaning, though not within its letter.* The intention of the lawmaker is the law.

Revenue laws are to be construed liberally to carry out the purposes of their enactment. Their penal provisions are not penal in the sense that requires a rigidly strict construction.† Where doubt exists as to the meaning of a statute, the title may be looked to for aid in its construction.‡ The pre-existing law, and the reason and purpose of the new enactment are also considerations of great weight.§

Upon the trial of this case the learned circuit judge held that silk neck-ties were within the last clause of the eighth section of the act of July 30th, 1864, unless the words "*not otherwise provided for*" excluded them from it, and brought them within the acts of 1861 and 1862. Such he instructed the jury was the effect of this negation.

In his view, those words referred not to the preceding part of the section in which they are found, but to the prior acts specified.

We agree with him as to the comprehensive character of the previous part of the sentence, if unqualified, but we dissent from his second proposition. To the latter, we think there is a conclusive answer.

The object of the statute was to increase the duties before imposed upon the things which it embraces. The title and the context alike show this. The preceding part of the sec-

* People v. The Utica Insurance Co., 15 Johnson, 380; Atkins v. The Fibre Disintegrating Co., 18 Wallace, 301; Bacon's Abridgment, title Statutes, 1, 2, 8, 5.

† Taylor v. The United States, 3 Howard, 197; Cliquot's Champagne, 3 Wallace, 115.

‡ United States v. Fisher, 2 Cranch, 386; United States v. Palmer, 3 Wheaton, 631.

§ Heyden's Case, 3 Reports, 77 *b.*; 1 Blackstone's Commentaries, 61; Sedgwick on Statutory and Constitutional Law, 1st edition, 287.

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tion contains a very full enumeration of articles of silk, both manufactured and unmanufactured. It was evidently intended to be exhaustive. The last clause seems to have been added, as it is not unusual in such cases, out of abundant caution, that nothing might escape. Hence, the phrase "not otherwise provided for," was interposed, and meant to apply, not to preceding acts which may not have been present to the mind of the draftsman, and to which there was no necessity to recur, but to the preceding enumeration in the same section—which it supplemented.

The section, thus construing this clause, covers the whole subject of silk, in all its variety of forms. It was complete in itself. There was no need to refer generally or specially to any prior act. If there was conflict, the prior legislation yielded, necessarily, *ipso facto* to the later.

All the manufactured articles enumerated in this section of the act of 1864 were subjected to a duty of 60 per cent.

The duty imposed by the acts of 1861 and 1862 is 35 per cent.

Why leave the non-enumerated articles, covered by the act of 1864, subject only to this lower rate of duty? Why this distinction? Such a result would, we think, be a solecism, and contrary to the spirit and purpose of the act. It cannot reasonably be supposed that such was the intent of the clause in question.

This view of the subject fixes the duty upon silk neck-ties at 50 per cent. *ad valorem*.

If we had not come to this conclusion, we should hold that the case is controlled by the twentieth section of the act of 1842. The provisions of that section first appeared in the second section of the act of September 11th, 1841.* They were re-enacted in the act of 1842, and were a permanent part of the customs duty system of the country. They were unaffected by any of the later tariff acts, and were in force when the duty in question was collected.† Under that section, as applied to the act of 1864, the rate of duty would be

* 5 Stat. at Large, 468. † Stuart et al. v. Maxwell, 16 Howard, 150.

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60 per cent. instead of 50. But, as we hold that the clause we have considered, of the eighth section of the act of 1864, applies, it excludes the operation of the earlier statute.

The construction we have indicated of these statutes, is that given to them in their practical administration by the Treasury Department ever since their enactment. This, though not controlling, is not without weight, and is entitled to respectful consideration.*

Our views as to the amount of duty chargeable on the neck-ties in question are corroborated by the following further considerations:

In the Revised Code of the United States, of June 22d, 1874,† the similitude clause of the act of 1842, and the eighth section of the act of 1864, are reproduced without change. The provision as to "articles worn by men," &c., is also reproduced, but as follows:

"Articles worn by men, women, or children, of whatever material composed, *except silk and linen,* made up or made wholly or in part by hand, not otherwise provided for, 35 *per cent. ad valorem.*"‡

The exceptions mentioned were here for the first time expressly interposed, but it was a legislative declaration that such was the state of the law on the 1st of December, 1873, without the exceptions; and it is necessarily a construction of the last clause of the eighth section of the act of 1864, in accordance with that which we have given to it. It was the declared purpose of Congress to collate all the statutes as they were at that date, and not to make any change in their provisions. Obviously these exceptions were intended to remove doubts and misconstruction, which were known to have prevailed to some extent.

The question whether these neck-ties were either "scarfs" or "ready-made clothing," was submitted to the jury, and

* Edwards v. Darby, 12 Wheaton, 206; United States v. Dickson, 15 Peters, 141; United States v. Gilmore, 8 Wallace, 330.

† Title 33, Treasury Compilation, pp. 233, 245.

‡ Treasury Compilation, schedule M, p. 251.

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they must have found the negative as to both. We have proceeded upon the assumption that this finding was correct. We have no power to review it in this proceeding.

JUDGMENT REVERSED, and the cause remanded to the Circuit Court with directions to award a *venire de novo*, and proceed

IN CONFORMITY TO THIS OPINION.

DONOVAN v. UNITED STATES.

Surveyors of ports performing the duties of collectors of the customs in ports other than those ports enumerated in the fifth section of the act of May 7th, 1822 (8 Stat. at Large, 698), that is to say of ports other than Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, are entitled to a salary of but $5000 a year, even though the ports in which such surveyors may be performing the duties of collectors had no existence on May 7th, 1822, and, like the port of St. Louis, were not created till 1831. The system of classes, established for salary purposes by the above-mentioned act of 1822, extends to surveyors doing collectors' duty in ports subsequently created.

ERROR to the Circuit Court for the Eastern District of Missouri.

Donovan was *surveyor* of the port of St. Louis, "performing the duties of *collector*," from January, 1860, to May, 1861. In the settlement of his accounts with the government he retained $6000 per year as his official compensation, claiming that sum as his legal allowance. The Treasury Department was willing to allow him $5000, but no more. And to get the $1000 in dispute the United States sued him on his official bond.

The question was: Are surveyors of ports, "performing the duties of collectors," under the act of 1831, entitled to the compensation of $6000 per year? The issue presented turned upon the right construction of certain statutes.

In the early history of the custom-house laws the collectors, naval officers, and surveyors received their compen

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sation from fees earned by them, which were provided for by the various statutes on the subject. As the business of the country increased the aggregate of these fees came to be so large that Congress saw fit to limit the compensation of these various officers, as derived from those fees. The first of these limitations, now in force, was that of the act of May 7th, 1822. This law was a limitation upon existing rights. Without it the officers named would, of course, have received compensation much larger than the sums named.

The statutes bearing on the case were thus:

By an act of May 7th, 1822, it was thus enacted:*

"SECTION 9. Whenever the *emoluments* of any collector of customs of either of the ports of Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, or New Orleans, shall exceed $4000, or the *emoluments* of any naval officer of either of said ports shall exceed $3000, or the *emoluments* of any surveyor of either of said ports shall exceed $2500 in any one year, after deducting the necessary expenses incident to his office in the same year, the excess shall in every such case be paid into the treasury for the use of the United States.

"SECTION 10. Whenever the *emoluments* of any *other* collectors of the customs shall exceed $3000, or the *emoluments* of any other naval officer shall exceed $2500, or the *emoluments* of any other surveyor shall exceed $2000 in any one year, after deducting therefrom the necessary expenses incident to his office in the same year, the excess shall in every such case be paid into the treasury for the use of the United States."

"SECTION 11. The preceding provisions shall not extend to fines, penalties, or forfeitures, or to the distribution thereof."

At the time of this enactment, St. Louis, of which Donovan was the surveyor, &c., was not "a port."

By an act of March 2d, 1831, "allowing the duties on foreign merchandise imported into Pittsburg, Wheeling, Cincinnati, Louisville, St. Louis, Nashville, and Natchez to be secured and paid at those places," and making St. Louis a port, a change is in some respects made in former laws.

* 3 Stat. at Large, 696.

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This act makes St. Louis and other places ports, which they were not before. By this law, as will be seen by reference to it, when any merchant in St. Louis imports goods he deposits with the surveyor a schedule of such goods, with an estimate of their cost. Upon this the surveyor makes an estimate of the amount of duties accruing, and the importer gives bond, approved by the surveyor, to pay these duties. The surveyor then sends to the collector at New Orleans a copy of this bond and schedule.

The importer then enters the goods at New Orleans, and the collector then certifies to the surveyor at St. Louis the amount of duties, and delivers the goods to the importer to be shipped to St. Louis. Upon reaching their destination, the surveyor having informed himself of the correctness of the entire proceeding, gives a permit for the landing of the goods.

These duties are, to some extent, in the nature of those performed in other ports by a collector.

The act enacts:*

"SECTION 5. That where surveyors are not already appointed in any of the places mentioned, a suitable person shall be appointed for such places; and on all such surveyors, whether appointed or to be appointed, shall devolve the duties *prescribed by this act, in addition to the customary duties performed by that officer in other places;* and the surveyor at each of said places shall . . . receive, *in addition to his customary fees*, an annual salary of $350."

This act first anywhere made surveyors perform the duties in any respect like those of collectors.

Next came an act of March 3d, 1841, thus:†

"SECTION 5. In addition to the account now required to be rendered by every collector of customs, naval officer, and surveyor of ports, every such collector, naval officer, and surveyor shall, each and every year hereafter, render a quarter-yearly account under oath to the Secretary of the Treasury of all sums of money by each of them respectively received or collected for

* 4 Stat. at Large, 480. † 5 Id. 421

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fines, penalties, or forfeitures; . . . or for rent and storage of goods, wares, or merchandise, which may be stored in the public storehouses, and for which rent is paid beyond the rents paid by the collector or other such officer; and if from such accounting it shall appear that the money received in any one year by any collector, naval officer, or surveyor, on account and for rents and storage aforesaid, and for fees and emoluments, shall in the aggregate exceed the sum of $2000, such excess shall be paid by the said collector, naval officer, or surveyor, as the case may be, into the treasury of the United States; and no such collector shall, on any pretence whatever, hereafter receive, hold, or retain for himself, in the aggregate, more than $6000 per year, including all commissions for duties and all fees for storage, or fees or emoluments, or any other commissions or salaries which are now allowed and limited by law. Nor shall such naval officer on any pretence whatever, in the aggregate, receive, hold, or retain for himself, hereafter, more than $5000 per year, including all commissions on duties, and all fees for storage, or fees or emoluments, or any other commissions or salaries which are now allowed and limited by law. Nor shall such surveyor, in the aggregate, receive, hold, or retain for himself, hereafter, more than $4500 per year, including all commissions, or fees, or emoluments, or any other commissions or salaries which are now allowed and limited by law."

Then followed an act of March 3d, 1857, thus:*

"SECTION 8. The provisions of the act approved the 3d day of March, 1841, which established and limited the compensation of collectors of customs, shall be construed to apply to *surveyors performing or having performed the duties of collectors* of the customs, who shall be entitled to the same compensation as is allowed to collectors for like services in the settlement of their accounts."

It was admitted as part of the case that after the passage of it all surveyors doing duty as collectors at the port of St. Louis have claimed $6000 as the maximum of their compensation, from all sources under the law.

Finally came an act of June 8th, 1872, in terms nearly identical with the one just quoted:†

* 11 Stat. at Large, 221. † 17 Id. 236.

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"The provisions of the fifth section of the act approved March 3d, 1841, which established and limited the compensation of collectors of customs, *shall be amended* and shall be construed to apply to *all* surveyors of customs ports performing or *having performed* the duties of collectors of customs, who shall be entitled to receive the same compensation as is allowed to collectors by said act of March 3d, 1841, for like services in the settlement of their accounts with the treasury: Provided that the fees, commissions, and emoluments prescribed by law, and collected by them, shall amount to such maximum allowance."

Over all came the Revised Statutes of the United States, whose purpose was not to make any new law, but to embody existing statutes. These enact:

"SECTION 2688. No collector or *surveyor performing the duties of collector* shall, on any pretence whatsoever, receive, hold, or retain for himself, in the aggregate, more than $6000 per annum."

The question on the whole case—fact and statutes—thus was, whether surveyors *now*, A.D. 1860–61, doing collectors' duty, were to be paid with reference to the *classes* into which, *for the purposes of salary*, collectors, surveyors, and naval officers seemed to be divided *by the early act of* 1822; to wit:

1st. The class doing duty at Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, who received the higher salaries.

2d. All others who received a lower one.

The government asserted that the system of classes, *established by this act*, extended to surveyors doing collectors' duty, though such a class of surveyors did not then exist, but was first constituted by the act of 1831.

Donovan, the surveyor at St. Louis doing collectors' duty, denied this, asserting that all surveyors doing collectors' duty were entitled to the pay of the highest class of collectors; in other words, though he admitted that if he had been collector at St. Louis he could have had but $5000, he asserted that as surveyor, doing in addition a collector's duty, he was entitled, under the acts of 1857 and 1872, to $6000.

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The ground of his position was that the act of 1822 applied to the two classes of ports existing at *that date;* that is to say, to ports which had both collectors *and* surveyors, each performing their respective duties, though in some ports enumerated, the duties of both were greater than in other ports not enumerated; that by the law of 1831, a third class of ports was created; that is to say, ports where the surveyor performed all the duties which in the two former classes the surveyor performed, and performed, in addition, the duties which in those ports were performed by the collector; ports, in other words, where double duty or more than double duty was performed by the surveyor; that this double duty entitled the party to an augmented compensation, and that this compensation was *meant* to be given by the act of 1857, and had always been claimed under it by surveyors doing collectors' duty; that the treasury making some difficulty, the act of 1872 had been passed making the right more clear, and that finally the Revised Statutes had put a legislative interpretation on the matter which removed all doubt, if doubt existed.

The Circuit Court (Dillon, J.) thus said:

"The provision of the act of June 8th, 1872—under which compensation is claimed by Donovan, upon the basis of $6000 per year instead of $5000—is that the compensation of such an officer shall be the same as that given to collectors by the fifth section of the act of March 3d, 1841, not to exceed, however, the maximum amount therein allowed. In 1859, in the case of *United States* v. *Walker*,* the Supreme Court of the United States construed the above-mentioned act of 1841, in connection with the previous acts *in pari materia*, and decided that as respects compensation there were two classes of collectors, viz., 1st. Collectors of the seven ports enumerated in the ninth section of the act of May 7th, 1822, whose total compensation from all sources might equal, but could not exceed, $6000 in a year; and 2d, all other collectors, *i. e.*, collectors of the non-enumerated ports, whose aggregate compensation could not exceed the sum of $5000 in any one year. I am unable to discover

* 22 Howard, 299.

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Argument in support of the surveyor's claim.

in the act of 1872 satisfactory evidence that it was thereby intended to abrogate, in favor of surveyors performing the duties of collectors, this established distinction between what is termed the enumerated and unenumerated ports.

"The act of 1841, as authoritatively construed, limited the aggregate compensation of a collector of one of the enumerated ports at $6000, and of a collector of any other port at $5000; but, while it did provide for the compensation of surveyor, it did not provide a specific compensation for a surveyor who, under the act of 1831, performed the duties of a collector of customs.

"This was sought to be remedied by the act of March 3d, 1857, but as its phraseology was not clear, and as complaints were made that it was illiberally restricted by the accounting officers of the Treasury Department to the surveyors of the principal ports, under the ninth section of the act of 1822,* the act of 1872, upon which the plaintiffs in error rely, was passed.

"This last-named act places 'all surveyors of customs ports performing the duties of collectors' upon the footing, as respects compensation, of collectors under the act of March 3d, 1841, for like services.

"St. Louis being a non-enumerated port, the maximum allowance to a collector can, in no event, exceed $5000, and this sum is, in my judgment, the limit of compensation to which the surveyor of the port of St. Louis is entitled."

Judgment was accordingly given for the United States, and the other side brought the case here.

Messrs. E. F. Noyes and D. I. Wright, for the plaintiff in error:

The act of May 7th, 1822, has given rise to the phrases, "enumerated" ports and "non-enumerated" ports. The places named in the ninth section are called "enumerated" ports, while all others are called "non-enumerated" ports. It is this distinction, erroneously applied, as we conceive it to have been, that has occasioned all the difficulty in this case.

* Congressional Globe, 2d session, 43d Congress, part 4, p. 3699

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Argument in support of the surveyor's claim.

No distinction of this kind is in terms created in the statute itself; that is to say, the phrase "enumerated," or "non-enumerated," is not made use of as applicable to ports themselves, as though it was the intention of Congress to create such a classification, as that it should run through all time forever thereafter. The word "ports" is used in the ninth section. It is not used in the tenth section. The tenth section simply speaks of various classes of officers by name: collectors, naval officers, and surveyors.

The limitation in the tenth section, as applied to collectors, for instance, applies to such collectors as were performing the duties known to the law at that time, and to such other collectors and surveyors as subsequently performed those same duties. It certainly could not be meant to apply to a new class of officers, then unknown, who were afterward created by law to do other things than collectors and surveyors then did, although they might be called by the name, collectors and surveyors.

This law was meant to cover all ports in existence at the date of its passage, May 7th, 1822. But why should it be construed to apply to ports not then in existence, but which were afterward created, with new duties, and new and distinct compensation?

In *Hall* v. *State*,* Ranney, J., referring to a case in this court,† says:

"A well-settled rule of construction here comes to our aid, which is, that 'a statute referring to, or affecting persons, places, or things, is limited in its operation to persons, places, or things as they existed at the time the statute was passed.'"

The enacting power knew what ports existed at the date of the passage of the act of 1822. It knew what the duties performed by the then officers were; but the Congress of 1822 could not be supposed to know what might take place in the distant future. The affairs of the country might so change as that new ports would be required. The duties of

* 20 Ohio, 16. † United States v. Paul, 6 Peters, 141.

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these new ports might be more onerous than those of any mentioned in the ninth section. Would it, then, be fair to limit the collectors of such new ports to a compensation inferior to that of those who do less work?

The next act is that of March 2d, 1831, which makes St. Louis for the first time a port, and imposes upon its surveyor what in fact were the duties, resembling in some respects those of a collector.

Thus, by this act, duties were imposed upon the surveyor of the port of St. Louis which had never been imposed before. Up to this time St. Louis was not a port at all. The surveyor of that place, if there was one appointed, discharged his duties, whatever they were, for which he received certain fees for each thing performed.

It is evident that it would not be just for Congress to impose upon a man new duties without paying him therefor.

Therefore it is that, in the fifth section of the act of 1831, Congress provides that for these additional services the surveyor so performing the duties of collector shall have a salary of $350, in addition to his customary fees.

If before 1831 the surveyor at St. Louis received $2000, after 1831 he would be entitled to $2350, which shows that the limitation of $2000, in the act of 1822, as to surveyors, does not apply to the surveyors of the act of 1831, who performed the duties of collectors as well.

The next law is that of March 3d, 1841. Prior to this law collectors had rented warehouses in which they stored goods as they were imported. They charged the importers storage. Soon the storage charged far exceeded the rent paid for warehouses, and the collectors received and kept large sums of money in the transaction. To prevent this abuse, the law of 1841 undertook to say that collectors should get no more than $2000 profit out of the warehouse business.

This act is also an act of limitation. It limits the amount which collectors may have from rent and storage to $2000. It further limits the maximum compensation of those col-

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lectors to $6000, as this court has said in *United States* v. *Walker*.*

The act of March 3d, 1857, enacts that the provisions of the fifth section of the act of 1841 "shall apply to surveyors performing, or having performed, the duties of collectors of the customs, who shall be entitled to the same compensation as is allowed to collectors for like services, in the settlement of their accounts."

It was supposed by the surveyor at St. Louis, that under this act, he "having performed the duties of collector," was entitled to $6000 per year, the new maximum allowed collectors under the act of 1841.

But as the law of 1857 was not thus construed by the Treasury Department, the law of 1872 was passed. Now, what was the mischief that this law was intended to remedy? The case shows "that since the act of March 3d, 1857, surveyors performing the duties of collectors have claimed the sum of $6000 as the maximum of their compensation from all sources, under the law." This claim has always been refused by the department, and this suit is to establish it. It was this refusal of the department to allow the $6000, under the law of 1857, that was sought to be remedied by the act of 1872.

This act purports to amend the act of 1841, and to apply it to "surveyors performing the duties of collectors." Suppose we make the necessary amendment in point of fact. The act of 1841 then reads thus:

"And no such collector, or surveyor performing the duties of collector, shall, on any pretence whatever, hereafter receive, hold, or retain for himself, in the aggregate, more than $6000 per year."

Does that not mean that he may retain $6000? Remembering that the fees, &c., of the surveyor, to which he was previously entitled by law, were much more than $6000, is he not now entitled to that sum?

It will be observed that in fixing the compensation of sur-

* 22 Howard, 290

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veyors performing the duties of collectors, no reference is had in the law to the compensation of other surveyors; but by the law of 1872 they are to have the compensation of *collectors*, as fixed or limited by the fifth section of the law of 1841. The only compensation there fixed for collectors is $6000, and so, as we have already said, the Supreme Court has decided in *United States* v. *Walker*. The maximum compensation of any other surveyor is $4500, and it is conceded by the department, and decided below in the case at bar, that surveyors performing the duties of collectors are to have at least $5000, which is $500 more than the surveyor of an enumerated port receives. This much being conceded, we think the conclusion inevitably follows that the compensation is $6000, and not $5000.

But again. Clearly the law of 1872 was enacted for some purpose or other. Unless the law of 1872 does give the surveyors "performing the duties of collectors" $6000 per year, it means absolutely nothing. The claim persistently made by them, subsequent to the act of 1857, was for $6000. This claim has been as persistently rejected. Certainly the law of 1872 intended to give them some advantage of some kind or other, which they did not have before. This advantage was to be in the matter of compensation, for the act of 1872 relates to nothing other than compensation.

What does the act of 1872 say? The law of 1841 "shall be amended." Why "amended?" Because it does not accomplish its object now. The result it arrives at, under the application of the law of 1857, is not satisfactory. That result is $5000. This not being satisfactory, the law must be changed and "amended." If $5000 was satisfactory to Congress, no change of existing laws, under the construction given, was needed.

This view is sustained by section 2688 of the Revised Statutes of the United States,* which are but declaratory of statutes existing when they were passed, *i. e.*, A.D. 1874; for, as lately said by this court,† "it was the declared pur-

* Page 397. † Smyth v. Fiske *supra*, 382.

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pose of Congress to collate all the statutes as they were at that date, and not to make any change in their provisions."

The idea that upon the question of compensation there are but two classes of officers—those belonging to enumerated and those to non-enumerated ports—is a wrong one. Abundant legislation by Congress shows this. Repeated laws have given to different officers, collectors and surveyors, salaries, in addition to that which they would have received if this classification alone existed.*

There is nothing in *United States* v. *Walker* rightly understood that militates against our position, though, upon this authority, the case below was decided against us.

Walker was collector of the port of Mobile, which was a port long prior to 1822. He claimed $6000, under the law of 1841, and his claim was disallowed, as it should have been, because, by the law of 1822, his compensation was limited to $3000, allowed a collector of a non-enumerated port, and by the act of 1841 he had $2000 from rent and storage. Walker made no claim under the act of 1831, as we do. No questions arising on that act could arise, nor were any considered by the court. The act of 1831 is not mentioned nor alluded to in the case from beginning to end. How could any rights under that act be determined? Courts decide upon what is before them, not upon what is not.

In our judgment, we are sustained by the Walker case in the views we entertain.

Mr. G. H. Williams, Attorney-General, and Mr. S. F. Phillips, Solicitor-General, contra:

The case turns mainly upon the meaning of the fifth section of the act of 1841.

* Compensation by special act is given as follows: May 26th, 1824, to collector of Nantucket, $250 per annum; June 30th, 1830, Natchez, Mississippi, collector, $500 per annum; June 30th, 1834, Newark, New Jersey, collector, $250 per annum and fees; July 7th, 1838 (§§ 9 and 10), Vicksburg collector, $500 per annum; December 31st, 1845, Galveston collector, fees, &c., not to exceed $2000; 1848, Astoria collector, $1000 and fees; June 2d, 1862 (§ 2), San Francisco collector, $6000; besides others.

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Argument against the surveyor's claim.

This act refers to and confirms the allowances to collectors, naval officers, and surveyors in the act of 1822, sections nine and ten, and therefore, by the maxim *verba relata inesse videntur*, is to be read as if containing those sections; its main purpose being to amend the eleventh section of such former act, which allowed to collectors, &c., the whole of what they might receive as fees upon fines, forfeitures, &c.

It therefore, by confirmation and by original enactment together, provides for *two* classes of collectors, &c., the one being entitled to salaries of $4000, out of fees upon duties, &c., in addition to $2000 out of fees upon fines, &c.; the other being entitled to salaries of $3000, out of duties, &c., in addition to $2000 out of fines. After effecting this, it proceeds to enact, by way of excluding any other official receipt, that under no pretence shall collectors, &c., receive more than $6000, &c.

It seems plain that this last clause is only a summary, as it were, of the effect of the former words of the section as to the *first* class of collectors, &c., and cannot be construed as meaning that *all* collectors, &c., should have salaries of $6000, &c. It leaves the *second* class to the operation of the greater restrictions of preceding provisions. The act of 1841 is a *restraining*, not an *enlarging* statute, and is to be construed accordingly.

If the statute of 1841 recognizes, and in effect provides for two classes of collectors, then the acts of 1857 and of 1872, which refer surveyors doing collectors' duty to the compensation provided in that statute for "collectors," recognizes and provides for similar (*i. e.*, two) classes of such surveyors, and, *reddendo singula singulis*, refers such of these as may act at *New York*, &c., to the $6000 aggregate, those at other ports to that of $5000.

We are not concerned to explain why the act of 1872 was passed when that of 1857 was already upon the statute-book. If the construction placed by the plaintiff upon the act of 1841 be correct, then the act of 1857 secures the claim made by him in the present action as completely as does that of 1872. If our construction of the act of 1841 be correct, the

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act of 1872 does not countervail its effect more than that of 1857. Both acts refer themselves for explanation to the act of 1841.

As for the argument derived from the Revised Statutes, it has no force whatever. It is no part of the business of the legislative department to make declarations for past cases about statutes which it has made, in other words, to expound for such cases the statutes of the country. That is a matter for this court alone, and the court would exhibit a sense of weakness to invoke the aid of such argument. It might as well inquire of each legislator individually what he had meant in voting for the act.

Our construction of the acts *in pari materia* as to this subject, is recommended as leading to a result corresponding to that policy of Congress which has drawn a line between certain collectors, &c., and others. If there be such a policy, why should not a construction maintaining it as to surveyors doing collectors' duty be referred to one which disregards it?

Again, if it were the purpose of Congress to give to officers like Donovan $6000 per annum out of such fees as they might receive, it would have been more natural and simple to express that design in other and fewer words than were adopted in the act of 1872.

Obscure expressions in acts intended by their promoters to give a larger compensation for services, which at such time are ended, than previous provisions had allowed, will not receive a construction to forward that design. For as regards such services the promoters are upon one side of the counter and the interests of the public are upon the other. The inclination is always *contra proferentem*, *i. e.*, as applied here, against special legislation.

The construction placed by the plaintiff upon the act of 1872 abolishes all distinction between collectors, as well as between surveyors doing collectors' duty. Both classes of officers or neither are, by the act of 1872, to have $6000 in all cases. More than this, both officers, or neither, are to receive $6000 in case any department of their fee-producing

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services amounts to so much; whereas the act of 1841 seems plainly to recognize that, in order to make up such $6000, one branch of such services must produce at least $4000, another at least $2000.

The act of 1822 applies to ports afterwards established as well as to those then existing. This is a rule of statutory construction almost universal. Statutes affecting "men" operate as well upon those born after as upon those then living; as those affecting "crimes" apply to crimes afterwards created; as a statute referring non-enumerated articles, for the duty payable upon them, to a *duty* laid upon like "enumerated" articles, applies as well to enumerations in later statutes; as a statute inflicting penalties in respect of articles "prohibited," applies as well to articles prohibited by later statutes; so here, when the act of 1822 speaks of "other collectors," &c., it means all other, whether then existing or afterwards to be created.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Officers of the customs derive their compensation chiefly from certain enumerated fees, commissions, and allowances, to which is added, for the benefit of the collector of the port, a prescribed sum, called salary, which is very much less than the compensation to which the officer is entitled. Provision for such fees, commissions, and allowances, were first made by the act of the thirty-first of July, 1789, which also allowed to collectors certain proportions of fines, penalties, and forfeitures.†

Changes have been made in the rates of fees, commissions, and allowances for such purposes at different periods to graduate the compensation of such officers to the nature and extent of the services imposed, but the theory and outline of the system have been preserved since the first acts were passed levying import and tonnage duties. Examples of such changes are found in the act of the eighteenth of Feb-

* Attorney-General v. Saggers, 1 Price, 189; Stuart v. Maxwell, 16 Howard, 150; United States v. Holliday, 3 Wallace, 407.

† 1 Stat. at Large, 64.

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ruary, 1798, for enrolling and licensing ships and vessels, and in the act of second of March, 1799, to regulate the collection of duties on imports and tonnage, and in the act usually called the Compensation Act, passed on the same day.*

Regulations of a permanent character were made by those several acts that certain fees and commissions should be paid to the collectors of the customs, together with a certain proportion of the sums paid to them for fines, penalties, and forfeitures collected from persons found guilty of violating the penal prohibitions of the revenue laws. Such fees, commissions, and allowances it was provided should be paid to the respective collectors, and the requirement was that they should keep an accurate account of the same and of all expenses for rent, fuel, stationery, and clerk-hire, and that they should annually transmit such accounts to the Comptroller of the Treasury, but they were allowed by those laws to retain the whole amount of the emoluments derived from those sources beyond the expenses of the office, without any limitation whatever. Expenses for rent, fuel, stationery, and clerk-hire were to be deducted from the gross receipts, but they were allowed to retain the whole of the net balance as official emoluments for their services.

Business revived and importations increased, and with such increase the compensation of the collectors at certain ports became excessive, which called for new legislation; and by the act of thirtieth of April, 1802, Congress prescribed a maximum rate of compensation without making any reduction of the fees or commissions required to be paid to the collectors, but the provisions of the act did not extend to fines, penalties, and forfeitures.†

By that act it was provided that whenever the annual emoluments of any collector, after deducting the expenses incident to the office, amount to more than five thousand dollars, the surplus shall be accounted for and paid into the treasury.

* 1 Stat. at Large, 171, 316, 695, 706. † 2 Id. 172.

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Twenty years' experience under that act showed that it needed revision, as it applied without any discrimination whatever as well to the large ports where the principal importations were made as to those of comparatively little importance. Collection districts were accordingly divided by the act of the seventh May, 1822, into two classes, usually denominated the enumerated and the non-enumerated ports.*

Under the provisions of that act the emoluments of collectors of the enumerated ports might reach the sum of four thousand dollars, but the ninth section of the act provided that whenever the emoluments of the office shall exceed that sum, in any one year, the collector, after deducting the necessary expenses incident to his office, shall pay the excess into the treasury for the use of the United States. But the maximum rate of compensation allowed to collectors of the non-enumerated ports under the provisions of that act, from all the sources of emolument therein recognized and prescribed, is three thousand dollars, and the tenth section of the act contains a provision similar to that found in the ninth section, requiring the collector of the non-enumerated ports to account for, and pay the excess, beyond the amount allowed as the maximum rate of compensation, into the public treasury.†

Collectors under those provisions may receive the maximum rate of their offices if the office, after deducting the necessary expenses incident to the same, produces that amount from all the sources of emolument recognized and prescribed by the laws in operation. No one can receive more than the maximum rate and his lawful claim may be much less, according to the amount of business transacted in the office.‡

From that time until the passage of the act of the third of March, 1841, the laws providing for compensation of collectors remained without material change. Every such

* 3 Stat. at Large, 698. † Hoyt v. United States, 10 Howard, 185.
‡ United States v. Macdonald, 2 Clifford, 281.

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officer is required by the fifth section of that act to include in his quarter-yearly account, among other things, all sums received by him for rent and storage of goods, wares, and merchandise stored in the public storehouses for which a rent is collected beyond what is paid for the same by such officer. Moneys received from that source, it is contended, may be retained by a collector of a non-enumerated port sufficient to make his annual compensation six thousand dollars, the claim being that the maximum limit prescribed to the non-enumerated ports is repealed by the subsequent legislation, but this court held otherwise and decided that the collector under that act could in no case retain more than two thousand dollars, and that he was bound to pay the excess beyond that amount, into the treasury as part and parcel of the public money.*

Consequently the conclusion was that the compensation of a collector of one of the *enumerated* ports may be six thousand dollars, but the compensation allowed to the collector of one of the non-enumerated ports cannot exceed five thousand dollars, according to the amount of fees and commissions collected and the amount received from rent and storage. Officers of the kind may receive the maximum rate of their office allowed by the prior law from the sources of emolument recognized and prescribed by that act, provided the office, after deducting the necessary expenses incident to the same, yields that amount from those sources; and in addition thereto he is entitled to whatever sum or sums he may receive from rent and storage, provided the amount does not exceed two thousand dollars, but the excess beyond that sum and the excess, if any, beyond the maximum rate of his office as fixed under the prior law, he is required to pay into the treasury as part and parcel of the public money.†

Attempt was subsequently made by the United States to limit the operations of the Storage Act, as a source of compensation to collectors, to such storage *only* as is received

* United States v. Walker, 22 Howard, 818. † Ib.

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for stores *leased* by the Treasury Department, for which rents are paid by the importers of goods beyond the rent paid on behalf of the United States, but the court refused to adopt that narrow construction, and held that all sums received for storage, whether the goods imported were deposited in the public stores or the "other stores" named in the acts of Congress, are required to be included in the quarter-yearly account of the collector, which he is directed to render to the Secretary of the Treasury, and that the yearly aggregate of such sums constitute the basis of computation in ascertaining what amount, if anything, the collector is entitled to receive as compensation from that source of emolument, and what amount, if anything, he is required to pay over from that source, as excess beyond the two thousand dollars, into the public treasury.*

None of these propositions are controverted by the defendant, nor does he contend that any of those provisions have been superseded by any express repeal, but he insists that surveyors performing the duties of collectors, under the fifth section of the act of the second of March, 1831, are entitled to the same compensation as the collectors of the *enumerated* ports.

Merchandise imported from a foreign port and consigned to merchants at St. Louis was required, if the importation was subject to custom duties, to be entered at the custom-house in New Orleans in the same manner as required in case of the entry of goods imported for consumption, and the officers of the customs at that port are required to proceed to assess the custom duties in the same way as if the merchandise had been destined for sale or consumption in that market.

Payment of the duties, however, is not required to be made at that port, but the importer is required to give a bond, called a transportation bond, conditioned that the packages described in the invoice shall, within a specified

* United States v. Macdonald, 5 Wallace, 656; Same case, 2 Clifford, 288; Clark v. Peasely, Circuit Court, Massachusetts District, October Term, 1862.

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time, be delivered to the surveyor and acting collector of the port of St. Louis. Due notice of the proceedings is then given by the collector of the port where the duties were ascertained and assessed to the acting collector of the port to which the merchandise is destined. Such proceedings being had, the vessel may proceed on her voyage, and when she arrives at the port of destination the packages are placed in the custody of the acting collector of that port, who receives the duties, giving notice of that fact to the collector of the port where they were ascertained and assessed, and the collector of the latter port is authorized to cancel the transportation bond given by the importer.*

Compensation was claimed by the defendant at the rate of six thousand dollars per annum, and it is admitted that he retained that amount of the moneys collected by him in pursuance of that claim, two thousand dollars of which accrued from rent and storage, and the other four thousand dollars accrued from fees, commissions, and allowances recognized and prescribed by the prior Compensation Act.†

Four thousand dollars may be received as compensation under that act by the collector of each of the seven ports named in the ninth section of that act, and the provisions of a more recent act give the same compensation to the collector of the port of Portland, Maine, but the tenth section of the said Compensation Act provides that whenever the emoluments of any other collector of the customs shall exceed three thousand dollars, after deducting therefrom the necessary expenses incident to his office, in the same year, the excess shall in every such case be paid into the treasury for the use of the United States.‡

St. Louis is not one of the enumerated ports, but the defendant insists that the act of the second of March, 1831, which devolved upon the surveyor of that port the duties of collector, designated a third class of ports, and that the

* 4 Stat. at Large, 482; Belcher v. Linn, 24 Howard, 516.

† 8 Stat. at Large, 895. ‡ 8 Id. 695; 18 Id. 46.

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maximum compensation of such a collector is six thousand dollars. Nothing is contained in the act to support any such theory or to afford the slightest evidence that Congress intended anything of the kind. Instead of that the act provides that the surveyor charged with such duties shall receive, in addition to his customary fees, an annual salary of three hundred and fifty dollars, which is utterly inconsistent with the theory that he is entitled by virtue of that act to the same compensation as the collector of one of the enumerated ports.

Confirmation of that view is also derived from the further provision of the same section, that no salary arising under the act shall commence until the act shall take effect and merchandise shall be imported under its authority. Prior to that time the customary fees of the surveyor of that port accruing under the Compensation Act of the seventh of May, 1822, could not exceed two thousand dollars, and it is not pretended that he could retain to his own use more than two thousand dollars from rent and storage.

Apply those suggestions to the case before the court and it is clear that the compensation of the defendant, if regarded merely as a surveyor, could not exceed four thousand three hundred and fifty dollars, even if it be admitted that the sum called salary is an addition to the four thousand dollars to be derived from the other sources of emolument and not merely an addition to the basis of calculation in computing the maximum to be derived from fees, commissions, and allowances, as provided in the tenth section of the Compensation Act.

Small sums called salary have always been allowed to collectors and to the surveyors of certain ports, but such allowances have uniformly been included in the basis of calculation as part of the receipts from fees, commissions, and allowances in computing the maximum compensation of the officers interested. Surveyors of ports, where the officer is charged with the duties of collectors, now stand upon a different footing, as the act of the third of March, 1857, provides that such surveyors shall be entitled to the

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same compensation as is allowed to collectors for like services, in the settlement of their accounts.*

Grant that and still it is contended by the defendant that the maximum compensation of all collectors, except those of the enumerated ports, as provided in the tenth section of the Compensation Act, is repealed by the act requiring collectors to include all sums received for rent and storage in their quarter-yearly accounts. Much discussion of that topic, however, is unnecessary, as the question has been twice determined adversely to the defendant by the unanimous decisions of this court.†

Such a collector cannot receive, under any circumstances, more than five thousand dollars, not even if the office earns a greater amount, and he may be obliged to accept much less in case the office does not earn three thousand dollars net from fees, commissions, and allowances, or in case the amount received from rent and storage falls short of two thousand dollars.

Effort is also made in argument to derive support to the proposition that the limitation contained in the tenth section of the Compensation Act is repealed, from the act which provides that the compensation of such a surveyor shall be the same as is allowed to collectors for like services, but it will be sufficient to say in response to that suggestion that the court is of the opinion that the proposition is destitute of any foundation whatever.

Suppose that is so, still it is insisted by the defendant that the act of the eighth of June, 1872, entitles him, as the administrator of the intestate, to retain to the use of the estate of the decedent a rate of compensation equal to six thousand dollars per annum, but the court is entirely of a different opinion.‡

Stripped of certain redundant words, the body of the act is exactly the same as section eighth in the prior act.§ Both

* 11 Stat. at Large, 221.

† United States v. Walker, 22 Howard, 314; United States v. Macdonald, 5 Wallace, 655.

‡ 17 Stat. at Large, 336. § 11 Id. 229.

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acts provide that such a surveyor "shall be entitled to the same compensation as is allowed to collectors for like services," and neither contains a word which is repugnant to the tenth section of the Compensation Act.*

Nor is the proviso in the latter act inconsistent with the prior limitation, as the maximum allowance to such a collector is three thousand dollars from fees and commissions and two thousand dollars from rent and storage.

JUDGMENT AFFIRMED.

RAILROAD COMPANY v. SWASEY.

1. A decree of foreclosure and sale is not "final" in the sense which allows an appeal from it so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined.
2. Hence, a decree is not "final" in such sense, where the court by an interlocutory order declares that certain shares in a railroad held by a State, are pledged for the payment of certain interest-bearing bonds of the State and the interest on them; and that the plaintiff and others whom he represents, as holders of such bonds, are entitled to have their respective proportions of the stock, or so much thereof as may be necessary, sold in order to pay the interest which is due to them; and orders a master to take an account of such unpaid interest and of what will be due by a day named, and also of the proportion of stock that may be equitably applicable to the payment of said interest found due to each plaintiff, and *make report to the court*. And orders further that unless by a day named it be made to appear to the court that the State has levied and provided for the collection of a tax sufficient to pay, or have otherwise secured the payment of, its arrears of interest, then so much of the stock of the State in the road, apportioned to the plaintiff and those he represents as may be necessary to pay off and discharge said arrears of interest, shall be sold to the highest bidder for cash. And after giving directions as to the manner in which a sale is to be made, at the end of all adds: "*And this cause is held for further directions.*"
3. This is but an interlocutory order announcing the opinion which the court has formed as to the rights of the parties, and the principles of the decree it would finally render, leaving the entry of the final decree in form to be made when the amount due has been ascertained and an apportionment of the stock made.

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* 8 Stat. at Large, 695.

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Statement of the case.

4. This court calls the attention of the Circuit Courts to what was said by Taney, C.J., in *Forgay* v. *Conrad* (6 Howard, 201), as to the care which ought to be exercised in the preparation of decrees of foreclosure; and observes that much time of this court and expense of litigants will be saved if more attention is given to the form of decrees when entered.

ON motion to dismiss, for want of jurisdiction, as not "final," an appeal from the Circuit Court for the Eastern District of North Carolina.

The case was thus:

The State of North Carolina by acts of her legislature passed in January, 1849, and 1855, subscribed for stock in the North Carolina Railroad Company, of the par value of $3,000,000. To pay for this stock she borrowed money and issued her bonds and certificates of debt with coupons for interest, redeemable in thirty years, with interest, payable semi-annually. In the laws authorizing these subscriptions and loans, she pledged and appropriated for the payment of the bonds or certificates the faith of the State, the stock and all dividends which might be declared thereon.

Of a large amount of these bonds one Swasey became the holder.

From the year 1869, the State received the dividends upon the stock, and appropriated the money to purposes other than the payment of the interest. A large amount of interest coupons being unpaid, a bill in equity was now filed by Swasey for himself and on behalf of several other bondholders, praying the Circuit Court of the United States for the Fourth District,

1st. To restrain the treasurer of the railroad company from paying any future dividends to the State treasurer.

2d. To restrain the State treasurer from receiving any future dividends.

3d. For the appointment of a receiver, &c.

After argument before the circuit judge, June 19th, 1871, he awarded the injunction, and appointed Mr. J. B. Batcheler a receiver.

Several dividends were accordingly paid to the receiver, and by him distributed, under various orders of the court.

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It becoming evident that the arrears of interest could not be paid without a sale of the stock, a motion for a sale was made by the plaintiffs, and on that motion the court entered a decree as follows:

"This cause coming on for further order, the court doth declare:

"1st. That by the terms of the charter of the North Carolina Railroad Company, and the amendments thereto, the shares of the stock in said company, belonging to the State of North Carolina, meaning thereby the shares and all dividends thereon, are pledged as security for the payment of the certificates of debt in such charter and amendments provided for, and for every part of such certificates, meaning thereby the interest accruing upon the principal thereof, as well as the principal.

"2d. That the plaintiff, and those he represents, as owners of such certificates of debt or bonds, or of coupons detached therefrom, now hold large amounts of the past due coupons of said certificates of debt or bonds, and that they are entitled to have their respective proportions of the stock, or so much thereof as may be necessary, sold, in order to pay such past due interest.

"Upon motion of counsel for the plaintiffs, it is therefore ORDERED and DECREED, that J. B. Batcheler, the commissioner heretofore appointed in this suit, take an account of such unpaid interest, and of such further interest as will be due on or before the 1st day of April, 1875, and also of such proportion of the said stock of the State of North Carolina, in said North Carolina Railroad Company, as may be equitably applicable to the payment of said interest found due to each of the said plaintiffs respectively, and *that he make report to the next term of this court.*

"It is further ordered and decreed, that unless on or before the 1st day of April, 1875, it shall be made to appear to this court that the said State of North Carolina has levied a tax sufficient to pay the said arrears of interest, and has provided for its collection, or shall otherwise have paid or secured the payment of the said past due interest, then so much of the said stock of the State in the said North Carolina Railroad Company, apportioned to the plaintiff, and those he represents, as may be necessary to pay off and discharge said arrears of interest, shall be sold to the highest bidder for cash."

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Directions are then given as to the manner in which the sale is to be made, and at the end of all are these words:

"*And this cause is held for further directions.*"

From this decree the North Carolina Railroad Company took an appeal, and this appeal it was which it was now moved to dismiss as not being "final," and therefore not within the expressions of the act of March 2d, 1803, which gives an appeal to this court only from "final judgments or decrees."

Messrs. W. J. Budd and F. C. Brewster, in support of the motion to dismiss:

A final decree in equity is defined by a very good text-writer, Mr. Daniells, to whose numerous authorities we refer without citing them, to be one which definitively adjudges the whole subject-matter; an interlocutory decree, one which disposes of some parts and reserves others for future decision.*

The present decree is not final, when tested by these principles laid down by Daniells.

Messrs. W. H. Battle and W. N. H. Smith, contra:

The decree is final and an appeal lies to this court.

It is a decree of foreclosure and sale, and disposes fully of the moneys arising upon a sale, leaving only to be performed, under the reference, such ministerial duties, in furtherance of the decree, as would secure the full benefits of its complete execution to the plaintiffs. Nor is it affected by the provision which suspends action under the decree, if "on or before the 1st day of April following the State of North Carolina shall levy a tax sufficient to pay" the interest, or shall otherwise pay or secure the same, since in all decrees of foreclosure of mortgages a day of payment is given, and if payment is made the sale is arrested, because

* Daniells's Chancery Practice, American edition of 1846, vol. ii, p. 1199 and notes.

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in either case the same object is obtained, the satisfaction of the debt.

We may admit that the decree is not "final" *ad unguem;* positively, completely, and perfectly final in all details. But it is not necessary to give an appeal that it should be so. In *Bronson* v. *Railroad Company*,* a motion was made to dismiss an appeal from a decree of foreclosure in a mortgage; the ground of the motion being there as here, that such a decree was not final. But this court say:

"This decree is not final in the strict technical sense of the word, for something yet remains for the court below to do. But, as was said by Chief Justice Taney in *Forgay* v. *Conrad*,† this court has not therefore understood the words, *final decree*, in this strict and technical sense, but has given them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.

"In the case of *Ray* v. *Law*‡ and *Whiting* v. *The Bank of the United States*,§ this court has decided that a decree for the sale of mortgaged premises is a final decree from which an appeal lies. The court rested their decision on the ground that when the mortgage was foreclosed and a sale ordered, the merits of the controversy were finally settled and the subsequent proceedings were simply a means of executing the decree."

The CHIEF JUSTICE delivered the opinion of the court.

An appeal may be taken from a decree of foreclosure and sale when the rights of the parties have all been settled and nothing remains to be done by the court but to make the sale and pay out the proceeds. This has long been settled.‖ The sale in such a case is the execution of the decree. By means of it the rights of the parties, as settled, are enforced.

But to justify such a sale, without consent, the amount

* 2 Black, 531.

† 6 Howard, 206; and see, to the same effect, Ray v. Law, 3 Cranch, 179; Whiting v. Bank of United States, 13 Peters, 11; The Palmyra, 10 Wheaton, 503; Wabash and Erie Canal v. Beers, 1 Black, 54.

‡ 3 Cranch, 179. § 13 Peters, 15.

‖ Ray v. Law, 3 Cranch, 179; Whiting v. Bank of the United States, 13 Peters, 15.

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due upon the debt must be determined and the property to be sold ascertained and defined. Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged. So, too, process for the sale of specific property cannot issue until the property to be sold has been judicially identified. Such adjudications require the action of the court. A reference to a master to ascertain and report the facts is not sufficient. A master's report settles no rights. Its office is to present the case to the court in such a manner that intelligent action may be there had, and it is this action by the court, not the report, that finally determines the rights of the parties.

With these well-settled principles as our guide, it is easy to see that the decree here appealed from is not final. The amount of the debt which the State must pay in order to stop the sale has not been determined, neither has it been determined what amount of stock may be sold if the debt is not paid. In each of these questions the State has a direct interest, and through its representatives in court has the right to be heard. They must be settled before the litigation can be said to be at an end.

The amount of the debt and the proportion of stock applicable to its payment are, therefore, still open for future adjudication between the parties. Thus far the court has done no more than declare that for the security of the payment of so much as is due, the plaintiff and those he represents have a lien upon their equitable proportion of the stock, and that the lien may be enforced by sale, if payment of the debt is not made. It has also declared its determination to order a sale, if payment of the debt is not made or satisfactorily provided for by April 1st, 1875. In order that proper action may be had when this time arrives, the master has been directed to state the account of the indebtedness to the plaintiff and those he represents, and of their proportion of securities pledged by the State. In this, as it seems to us, the court has acted upon the suggestion in *Forgay* v.

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Conrad,* and by an interlocutory order announced the opinion it had formed as to the rights of the parties and the principles of the decree it would finally render, leaving the entry of the final decree in form to be made when the amount due has been ascertained and an apportionment of the stock made. In this way the rights of all parties can be protected and no injustice done.

In this connection it may not be improper to call the attention of the Circuit Courts to what was said by Chief Justice Taney in *Forgay* v. *Conrad*, as to the care which ought to be exercised in the preparation of decrees of this character. Much time of this court and expense of litigants will be saved if more attention is given to the form of decrees when entered.

APPEAL DISMISSED.

UNITED STATES v. WILLIAMSON.

An officer of the army who is ordered, even on his own request, to proceed to a particular place, including his home, and "there *await orders*," reporting thence by letter to the Adjutant-General of the Army and to the headquarters of the department to which he then belongs, is not an officer "absent from duty with leave" within the act of Congress of March 3d, 1863, which enacts that "any officer absent from duty with leave, except from sickness or wounds, shall during his absence receive half of the pay and allowances prescribed by law, and no more." Such an officer is waiting orders in pursuance of law, but not absent from duty on leave.

APPEAL from the Court of Claims. The case was thus:

An act of March 3d, 1863,† relating to the government of the army, enacts—

"That any officer absent from duty with leave, except for sickness or wounds, shall, during his absence, receive half of the pay and allowances prescribed by law and no more."

* 6 Howard, 201.

† 12 Stat. at Large, 736.

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Statement of the case.

This statute being in force, Williamson was commissioned as a captain in the Forty-second Infantry to rank from January 22d, 1867; and served as captain in that regiment until it was consolidated with the Sixth Infantry. This consolidation was effected by General Orders Nos. 16 and 17, series of 1869, from headquarters of the army.

General Order No. 16 was issued in compliance with the second section of an act of Congress of March 3d, 1869,* by which the infantry regiments were required to be consolidated, and the whole number reduced to twenty-five regiments.

This order, after requiring the consolidation of infantry regiments as directed in the act of Congress, further directed that the senior company officers of each grade present for duty with any two regiments to be consolidated and fit for active service, would be the officers of the consolidated regiment. The supernumerary officers were to be ordered to their homes to await further orders.

The order further provided that all vacancies that might thereafter occur in the twenty-five infantry regiments would be filled by assignment of the senior officers of the same grade from the list of officers awaiting orders.

General Order No. 17 provided that the company officers would be assigned as directed in General Order No. 16, from the senior officers present and fit for active service with any two regiments consolidated; but "should any of the officers so assigned"—said the order—"prefer *to await orders*, the senior officers of the grade desiring service with their regiments may be substituted for them."

It provided further:

"No applications can be entertained from officers 'awaiting orders,' or on the 'retired list,' for special duty. If their services are required they will be detailed without applying."

After the consolidation of the Forty-second Regiment with the Sixth, Williamson, on the 22d of April, 1869, was

* 15 Stat. at Large, 318.

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regularly assigned as captain of company H, in the Sixth Consolidated Regiment, and on the 20th of May following he joined his company. On the 29th of the same month he was regularly transferred from that company to company A, *vice* Captain Bailey, unfit for active service.

It did not appear that Captain Williamson ever joined company A, to which he was transferred. Soon after his transfer, being then at Fort Gibson, Cherokee Nation, he addressed, May 3d, 1869, a note to the Adjutant-General of the Department of Missouri—the proper department for him to address—by which, "in accordance with paragraph 3, General Order No. 17, current series, headquarters of the army," he "elected to be placed on waiting orders."

On the 21st of June, 1869, the Adjutant-General responded to the claimant's request, as follows:

"By authority of the General of the Army, Captain Williamson, Sixth United States Infantry, is, at his request, relieved from duty in this department, and will proceed to his home and *await orders, reporting thence by letter to the Adjutant-General of the Army, and to these headquarters.*"

Captain Williamson was mustered out of service on the 31st of December, 1870.

From the 15th of December, 1869, to the 31st December, 1870, he received at the rate of $165 per month, the rate fixed by Congress as the pay of a captain of infantry, less than full pay by $690.11. For this sum of $690.11 he brought suit against the United States in the Court of Claims.

The court awarded to him the amount claimed, and the United States appealed to this court.

Mr. G. H. Williams, Attorney-General, and Mr. John Goforth, Assistant Attorney-General, for the United States:

It was at his own request that Captain Williamson was relieved from duty, *i. e.*, from command of a company in the Sixth Regiment of Infantry, and from that time up to December 31st, 1870, the date when he was mustered out of

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service, he was absent from duty, ceasing to perform any military service or to actively exercise the functions or authority of an officer of the army of the United States.

He was absent from duty with leave, being neither sick nor wounded; whether he technically asked for a leave of absence *eo nomine*, or whether, within the spirit of the law, he elected to be placed on waiting orders. The act itself merely says, "absent from duty with leave;" absent—not necessarily by means of "a leave of absence," so called, but absent from duty with leave, howsoever that absence from duty was accomplished, if according to law and the regulations. There can be but two classes of officers under this head: those who are actively performing military duties, *i. e.*, in charge of some military business, and those from whom all functions of a military character are withheld by the operation of absence from duty. Here there was an officer placed in command of a company of infantry—that is to say, ordered to the performance of military service—who elected to be placed on waiting orders, *i. e.*, to be absent from all such duties, and he now demands the same pay and allowances when his request is acceded to that he would have been entitled to had he been actually and actively on duty. The act of March 3d, 1863, says that in case of absence he shall receive "but half of the pay and allowances prescribed by law, and no more," and, as he has received these, he has no further claim on the United States.

Mr. H. E. Paine, contra.

Mr. Justice HUNT delivered the opinion of the court.

The argument against the allowance of full pay is based upon the act of March 3d, 1863, which provides "that any officer absent from duty with leave, except from sickness or wounds, shall during his absence, receive half of the pay and allowances prescribed by law, and no more." Captain Williamson, it is said, was, during the period in question, absent from duty with leave, being neither sick nor wounded, and hence, it is said, can receive but half-pay, however that

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absence might have been caused. This argument is unsound.

The distinction between the case of an officer "absent from duty with leave" and that of an officer ordered to proceed to a particular place and there "to await orders, reporting thence by letter to the Adjutant-General of the Army and to these headquarters," is too plain to require much comment.

While absent from duty "with leave," the officer is at liberty to go where he will during the permitted absence, to employ his time as he pleases, and to surrender his leave if he chooses. If he reports himself at the expiration of his leave, it is all that can be asked of him.

The obligations of an officer directed to proceed to a place specified, there to await orders, are quite different. It is his duty to go to that place and to remain at that place. He cannot go elsewhere; he cannot return until ordered. He is as much under orders, and can no more question the duty of obedience than if ordered to an ambush to lie in wait for the enemy, to march to the front by a particular direction, or to the rear by a specified time.

The authority to give leave of absence is committed by law to particular persons; the mode of making the application for leave is pointed out and the maximum of its duration is prescribed.* A department commander can grant leave of absence for a period not exceeding sixty days. Applications for leave exceeding four months must be referred to the War Department.

The direction, on the other hand, to proceed to a particular place, there to await orders, how long to remain there, to attack, to retreat, or to do any other specified thing, belongs to the officer in charge.

That the assignment was made at the request of the officer can make no difference. The pay is regulated by the position, and not by the manner or influence by which the position is acquired.

* Army Register, 1868, Article 21, adopted by the act of July 28th, 1866

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Syllabus.

Captain Williamson was ordered by the Adjutant-General of the Department of Missouri, by authority of the General of the Army, to proceed to his home and await orders, reporting thence by letter to the Adjutant-General of the Army, and to these headquarters.

The power to make this assignment was a portion of the executive authority, and was vested in the commander of the army. Captain Williamson was not only justified in obeying this order, but it was his duty to obey it. It was his duty to proceed at once to his home, there to remain, subject to orders to be communicated to him. He was expressly required by general order to make no application for special duty, but was informed that if his services were required a detail would be made without his application. He did proceed to his home and there remained waiting for orders until he was mustered out of the service. He was waiting orders, in pursuance of law, but was not absent from duty on leave.

It is not in the power of the executive department, or any branch of it, to reduce the pay of an officer of the army. The regulation of the compensation of the officers of the army belongs to the legislative department of the government. Congress has fixed the pay of a captain of infantry at $165 per month. The deduction of one-half of the amount, when absent from duty on leave, is not applicable to the case of Captain Williamson. He is entitled to his full pay as a captain of infantry. The Court of Claims has done right, therefore, in giving its award in his favor for the amount withheld, and its judgment is

AFFIRMED.

FASHNACHT v. FRANK.

Where in a suit pending before it a State court dissolves an injunction (previously granted by it on an allegation by the mortgagor, that the mortgagee had agreed to give him further time) against proceeding to sell mortgaged premises, under a foreclosure already had, and after such

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dissolution—the effect of which is, of course, to leave in force a final decree of sale—an alien defendant petitions for a removal into the Circuit Court under the act of July 27th, 1866, "for the removal of causes in certain cases from State courts," and the State court refuses to grant that petition, the defendant not excepting, and the case is afterwards taken to the Supreme Court *on an appeal from the decree dissolving the injunction*, no jurisdiction exists here to review the judgment of the Supreme Court under section 709 of the Revised Statutes, and on the ground that a right, title, privilege, or immunity has been claimed under a statute of the United States, and that a decision of the highest court of the State where a decision could be had has been against it. The refusal of the State court to grant a removal under the act of Congress not having been excepted to, and *that* matter not having been involved in what was before the Supreme Court, its judgment cannot be held to have embraced it, nor indeed anything but the matter of the dissolution of the injunction; a matter which involved no Federal question.

ON motion to dismiss, for want of jurisdiction, a writ of error to the Supreme Court of Louisiana.

The case was thus:

Frank, a citizen of New Orleans, having a mortgage on property in New Orleans of Fashnacht, a citizen of the Republic of Switzerland, obtained an order in the Fifth District Court for the Parish of New Orleans, for the seizure and sale of it.

Fashnacht thereupon procured from the same court an injunction on the sheriff and on Frank restraining the execution of the order, alleging in his petition for the injunction and as a ground for it, that at the time when the mortgage was executed and as an inducement to the execution, Frank, the mortgagee, had granted to him time for paying the bond, which the mortgage was given to secure; although that fact did not appear as a matter of mention in the contract.

The case came up January 16th, 1874, on the question of a permanent injunction. Testimony was taken, witnesses examined, letters read, &c., and the court on that day dissolved the injunction, with damages.

On the 20th of the same month a motion for a new trial was made and refused.

Fashnacht, the defendant, thereupon, on the 23d of Jan-

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uary—that is to say, three days after the refusal to allow him a trial—filed a petition to remove his case into the Circuit Court of the United States, under the act of July 27th, 1866, "for the removal of causes in certain cases from State courts;" an act which enacts that "in any suit in any State court against an alien, if the suit so far as relates to the alien defendant, is one in which there can be a final determination of the controversy so far as respects *him* without the presence of the other defendants as parties in the cause, then the alien defendant may at any time before the *trial* or *final hearing of the case*, file a petition for the removal of the cause, as respects *him*, into the next Circuit Court of the United States," &c.

The petition of Fashnacht for the removal stated that the suit could be thus determined.

The court refused to allow the transfer. It said:

"The order is refused, for the reason that the case was tried and determined by this court after an appearance and pleading of the defendant therein. The order should have been asked for *in limine*, and the case having been finally determined, as far as this court had jurisdiction, the parties must abide its decision, unless they see proper to appeal therefrom."

Thereupon, on the 31st of January, Fashnacht appealed to the Supreme Court of Louisiana from the decree of the Fifth District Court of the Parish of New Orleans, dissolving the injunction, but from nothing else.

The Supreme Court affirmed the decree of the court below.

From this judgment of affirmance the present writ of error was taken by Fashnacht, under the assumption that the case came within section 709 of the Revised Statutes, which gives such writ to bring here for re-examination, a final judgment or decree in the highest court of a State in which a decision in the suit could be had, in cases where any title, right, privilege, or immunity is claimed under any statute of the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed under such statute.*

* See Appendix.

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Mr. Conway Robinson, in support of the jurisdiction:

The suit of Frank having been commenced against an alien, the alien defendant, before the trial or final hearing of the cause, filed a petition for the removal of the cause into the next Circuit Court of the United States, herein setting up and claiming a right, privilege, and immunity under a statute of the United States. It was, thereupon, the duty of the State court to proceed no further in the cause. But the court refused to grant a removal, and herein made a decision against the right, privilege, and immunity thus set up and claimed, under a statute of the United States, and this decision has been affirmed by a final judgment in the suit in the highest court of the State in which a decision in the suit could be had.

It is no answer to say that the petition to remove was too late, and that the decree of the Fifth Parish Court was right. If the decree of that court was against a right, privilege, and immunity set up by us, and if that decree has been affirmed in the Supreme Court of Louisiana—the highest court of the State—this court has jurisdiction to review the case; and this motion cannot prevail, whatever may be the ultimate decision of this court, when the matter of merits comes to be considered.

Mr. T. J. Durant, contra.

The CHIEF JUSTICE delivered the opinion of the court.

Previous to the time when the motion for a new trial was made and overruled, no question had been presented in the cause that could under any circumstances give this court jurisdiction upon a writ of error. On the 23d of January a petition was filed by the defendant for the removal of the cause to the Circuit Court of the United States. This petition was at once very properly overruled, for the reason that a final judgment had already been rendered. No exception was taken to this ruling. So far as appears the defendant was satisfied, as he should have been, that he could not have relief in that form against the judgment which had

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been rendered. On the 31st of January an appeal from the judgment was taken to the Supreme Court of the State. This was clearly the appropriate remedy for the correction of the errors of the District Court, if there were any. The action of the District Court in refusing the removal does not appear to have been presented to the Supreme Court upon this appeal. It could not properly have been presented, because the appeal was from the judgment alone, and this action was subsequent to the judgment and independent of it. We act only upon the judgment of the Supreme Court. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error.

WRIT OF ERROR DISMISSED.

CROSBY v. BUCHANAN.

1. A., in 1812, made a deed to V. conveying to him valuable estates, V. by a separate instrument, agreeing that if A. would, within five years, pay to him a certain sum ($14,500), he would convey to A.'s children, then infants, a part of this estate, and convey also to them a part of certain other estates. Soon afterwards V. acknowledged that A. had paid to him a large part ($11,600) of the money to be paid.

On proceedings in equity many years afterwards, in the Circuit Court of the United States, the children, now become of age, prayed for—

1st. A cancellation of the deed by A., as having been fraudulently procured by V.

2d. That if this would not be decreed, then, on payment by the children of the balance with interest, for a specific performance by V. of his contract to convey the two parts of the estates which he had agreed to convey, if $14,500 were paid in five years.

3d. If the court would make neither of these decrees, then that it would decree that V. should refund with interest the $11,600 purchase-money that had been paid to him.

The Circuit Court in 1853 refused to decree a cancellation of A.'s deed, refused also to decree that V. should specifically perform his agreement to convey; but as to the return of the $11,600 purchase-money paid, the court said that it could not pass on that matter, proper parties not being before the court, and made no decree about it. Proper parties came in, and after hearing, the court refused to order a return of the purchase-

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money, and, finally, A.D. 1872, dismissed the bill by A.'s children. *Held*, That no "final decree" in the sense of the statute which authorized appeals from the Circuit Court to this court in the case of final decrees in equity was made in 1858, nor indeed before 1872; and that the decree then entered brought up the whole case; that is to say, brought up the question of cancellation, the question of specific performance, and the question of return of purchase-money.

2. Where the transactions out of which a case now before the court arose, occurred sixty-five years ago—litigation about them having been going on all the while—and the particular one before the court was begun thirty-five years ago, the court declared it to be high time that the case was ended, and that the court was not inclined to add to its length of years by looking after matters of mere form (objections of which were apparently now first made), in order to avoid substance.

3. In a court of conscience deliberate concealment is equivalent to deliberate falsehood. When a living man speaks in such a court to enforce a dead man's contract with himself against parties who he knows are ignorant of the facts, he must be frank in his statements, unless he is willing to take the risk of presumptions against him.

4. Accordingly where a party who has never been in possession comes into equity to enforce a deed for valuable estates made twenty-five years before, by the parents (now dead) of the persons now proceeded against, and which persons, when the deed was executed were young infants, has his bill answered by them, they stating that they were very young when the transactions relied on occurred, and that they had no personal knowledge about them, denying generally the allegations of the bill, suggesting many grounds for serious doubt as to their truth, and demanding of the claimant full and express proof of the fairness of the deeds, and of the full payment of the alleged considerations thereof, and of the circumstances of the execution of the deeds, it behooves the complainant, so far as he possibly can, to give such information, and if he shelter himself behind the mere execution of the deeds themselves, saying in his pleadings that he "cannot suppose that it will be necessary for him to allege or prove the payment of the consideration acknowledged in solemn form by the parties to the said deeds until the fairness of the transaction and fulness of consideration is impugned by proof," the court will hold that he has come before it with hands not clean, if in the progress of the case, and as things are developed, it turns out that he had agreed to reconvey part of the property, with other property, upon payment of a certain sum, and that he has acknowledged payment of a part of the sum, though he have agreed to convey only in case the sum were all paid within a certain time, and though he now aver, that in point of fact, the acknowledgment was made on a supposition that the person to whom it was paid would pay certain debts, which he failed to pay, &c. And the court will accordingly order the deed to him to be cancelled, and will not help him to obtain payment of even such minor claims as perhaps he really and justly had.

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Statement of the case.—Samuel King.

APPEAL from the Circuit Court for the Western District of Virginia. The case was thus:

William King, of Abingdon, a village of Washington County, in the southwest corner of Virginia—a man possessed of valuable brine springs, at Saltville, close by it, and of other large estate—died in 1808 childless, leaving a wife and eight brothers and sisters; among the brothers one named Samuel, and among the sisters one named Hannah, married to John Allen. He left also a nephew, William King, Jr.

By his will he devised the bulk of his estate, valued at about $500,000, to his nephew (the said William King, Jr.), on a condition which, as things turned out, proved impossible. The fact of the impossibility of the condition led at once to litigation, and in 1830 and 1836, the will in two different suits was the subject of construction in this court.

It was held in the first suit,* that the whole estate was devised to William King, Jr. (the nephew), subject to the life estate of the widow, but as it belonged to a court of chancery to determine whether he took the estate to his own use or in trust for the heirs of the testator, that question was left undecided. Accordingly, a bill in chancery was filed to test that question, and in that case, the second one, this court decided that he did take in trust for the heirs.†

Samuel King, and Mrs. Hannah Allen, the wife of John Allen, thus each became entitled to an eighth part of the estate. Samuel King lived at Somerset, a place in Pulaski County, in the southeast corner of Kentucky; Allen and his wife at Saltville. The two places were, perhaps, two hundred miles apart.

Independently of any general interest acquired as just mentioned by Samuel King in his brother William's estate, the brother by his will had made a special provision for him thus:

"I leave to the said Samuel, in case of personal application to

* Finlay and Mitchell v. King's Lessee, 3 Peters, 346.

† King v. Mitchell, 3 Id. 326.

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the manager at Saltville, or to my executors at Abingdon, on the 1st day of January annually, $150. If not called for on that day to be void for that year. Receipt to be personally given."

The testimony of different witnesses thus described Samuel King.

One said:

"He was notoriously and incorrigibly intemperate; though not often in such a condition that he could not go about."

Another said:

"I do not recollect that I ever saw him where spirituous liquors were to be had that he did not drink to excess."

A third:

"He was generally intoxicated; that is to say, generally speaking, when I saw him he was so."

A fourth:

"If I ever saw him sober, I have no recollection of the fact. He was in the habit of constantly drinking."

This Samuel King, as the testimony further showed, was not only intemperate but was always *considered* very poor. One witness, Mr. Fox, of Somerset, clerk of the County Court of Pulaski, Kentucky, thus testified:

"To the best of my recollection he was at all times in a manner destitute of any property or credit. I well recollect that he applied to me as often as three times to borrow the sum of $5, each time, as he said, to defray his expenses to Abingdon, Virginia, where he was going to draw his legacy coming to him from the estate of his brother William King, which sums I lent him, he promising to refund the amounts upon his return, which, however, he never refunded."

Mr. Benjamin Estill, a lawyer, long resident in Abingdon, Virginia, said:

"He was believed to be totally insolvent for three years before his death, which event took place in 1812. I have seen him several times in Abingdon applying for his annuity, and understood that he came on foot from Somerset in Kentucky, where he lived."

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Besides being poor and given to drinking spirituous liquor in excess, there was testimony about him thus, and there was no testimony to contradict it.

One witness said:

"I always considered him as a very wild and visionary man, incapable of making bargains to any amount, when he had been drinking, and especially when there was any intricacy in the transaction."

Another said:

"I never saw him at any time in a condition when he could contract or trade to any advantage to himself or his family."

Additional witnesses confirmed this account of him; one saying:

"I never saw him after the death of his brother, that I thought him capable of transacting business of any kind. He ought to have had a guardian, and if he had been in the North would have had one."

We have mentioned that one of the heirs of William King, of Abingdon, was his sister Hannah, married to John Allen.

Allen's character was thus testified to.

One witness said:

"John Allen's general character as to correctness of dealing in money matters was bad. I am not able to say whether Samuel King was an easy subject for fraud. But Allen's general character was such that he would take advantage of any man if an opportunity offered, and he would do it so smoothly that the person imposed on would consider him a friend."

A second one said further:

"I was well acquainted with John Allen, and knew no good of him. I thought him capable of committing frauds of any enormity."

In addition to these two persons, connected, as we have said, by marriage with one another, and by their common right to participate in the large estate of William King, there appeared a third person, a principal actor in the con-

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troversies, the subject of this report. His name was John Vint, and he was entitled "of Washington City in the District of Columbia."

Vint was an Englishman, who came to the United States in 1800. His relation to the parties connected with this suit begins about the year 1810, when he is found in intimate relations with Allen; but the mode of origin of his said relation was nowhere distinctly shown, nor with any detail. His name was connected, in the present case, with large transactions. How far property was traced with distinctness as being really his, so as to enable him to purchase in the way, as it will be seen in the sequel, that he alleged he truly did purchase in this case, will appear by the testimony which follows.

One witness said:

"I never saw him till he and John Allen came to purchase a negro girl I owned. I knew nothing of his pecuniary condition. I was acquainted with Allen before. I sold them the girl. They never paid me."

Another witness, one Russell, said:

"In November, 1810, Mr. Vint had a store in the house of Mr. John Allen, and had there a considerable quantity of goods, which were said to be Vint's; but I do not recollect that I ever heard either Allen or Vint say that they belonged to Vint. I was frequently at the store. The shelves were pretty well filled with a good display. I heard it spoken of about that time, that Vint had sold out to Allen. Previous to that time Allen was frequently embarrassed, but as respects the condition of property I am not informed."

A third witness, Francis Smith, an attorney at law, who had married the widow of William King in 1811, but who testified that he had no interest whatever in the result of the suit, confirmed the view of these two witnesses:

"Previous to September 5th, 1812, there were placed in my hands for collection large claims on Allen. I know that he was hard pressed long before in his pecuniary affairs, and that he was never able to purchase and pay $11,600 for any property.

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Statement of the case.—Samuel King, his disappearance and death.

He had nothing, and was able to purchase nothing. About this time I frequently saw both Allen and Vint. They were sometimes in jail and sometimes out. I thought both of them without property or means."

A fourth witness, one Stout, however, testified in rather an opposite way. He said:

"I recollect the sale by John Allen to John Vint of his interest in the estate of William King, for the sum of about $18,000. I understood from John Allen that at the time of the sale he owed to him, Vint, a small sum, about $2000, and that the balance of the purchase-money was paid by Vint in goods, which Allen afterwards told me he had received. I farther know of my own knowledge that Allen did receive a great many goods from Vint."

However, as stated, *infra* (see p. 433), by Vint himself, this sum of $18,000 was not a true consideration.

We now return to Samuel King, already mentioned as intemperate, poor, and visionary. We have stated that he lived in Kentucky and was obliged to come in the beginning of each year, in person, to Saltville or Abingdon, to give his personal receipt for the $150 left to him by his brother's will. He came for the last time in January, 1812, when he claimed payment for two years.

A witness, resident at Abingdon, thus testified:

"When he came to Abingdon, he came to Allen's; Allen kept a public house. He came there drunk, riding a little chunk of a pony, and dressed in a common dress. He was almost always drunk during the time that he was there. When he got to Abingdon he was asked by Allen's family how he had paid his expenses from Kentucky, and whether he had put up at private houses or at taverns? He said that he had put up at any place that he could get in at, and told the persons with whom he put up that he would pay them on his return; for that he would get this year two years' payment. Allen told him that he could get but one, for that he had not come for the last year's payment at the right time, and that under the terms of the will it was gone. Allen's family told me that he was a poor man; and Mrs. Allen, his sister, told him in my presence to return to

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his family, for that they would suffer in his absence. I thought him to be deranged from intemperance, and this opinion was entertained by the family of Allen generally."

Having got payment for either one or for two years, King set off on his pony to go back to his home, in Kentucky. He arrived at the house of a man named Pridemore, about sixty miles from Abingdon, to stay all night, and "while there," according to the language of a person who saw him, appeared "during the evening to be very uneasy, going frequently to the door in a state of alarm, and saying that he feared a man by the name of John Allen, and other persons who were following him from Abingdon, and that he would be assassinated." In the morning his hat and boots, pocket-book and saddle-bags were in his room, but he himself could not be found, and was never again seen or heard of. For some time grave suspicions of murder rested both upon Pridemore and upon Allen. But it finally rather appeared that King had gone out of the house in the middle of the night under the influence of *mania a potû*, and wandering through the forests thereabouts had fallen into a rapid stream, swollen by recent rains, and was lost among the gorges of the mountains which rise in that region. The whole matter, however, remained much a mystery.

His pony, saddle-bags, pocket-book, hat, and boots were sent back to his brother-in-law, Allen, by whose wife the saddle-bags and pocket-book were opened and examined. They contained papers but no money.

The unfortunate man himself left, at the time of his death, three children, aged respectively about one, three, and five years.

Allen died not long after, also leaving several children, all young.

We come now more particularly to certain facts of this case.

It seemed plain enough that on the 16th of November, 1810, Allen and wife executed a deed by which, for the *professed* "consideration of $18,901.27, current money, to them in hand paid," they conveyed to Vint all the right and in-

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terest which the said Allen, in right of his wife, and also which his said wife had in the estate of the said William King, that is to say one-eighth part of that estate; and also a certain fifth part of the eighth of the estate which came to Samuel King as one of the heirs, which fifth the deed recited that the said Samuel had conveyed to Allen, who was to reserve it as a compensation to counsel, for services in the suits already mentioned at the beginning of the report of this case (page 422), brought to establish in effect an intestacy, and the rights of the heirs.

This deed had apparently been witnessed on the day of its date, November 16th, 1810, in the ordinary way, by three witnesses; but was not then acknowledged, proved, or recorded. On the 27th of April, 1812, fifteen months after the date of its execution, and as was specified on it, "at the request of Allen," its execution was attested *de novo* by two other witnesses. On the 7th of May following, it was proved for record in the way required by the laws of Virginia.

The scrivener who drew the deed testified that he drew it carefully; the transaction being large; but that he knew nothing about the true consideration of it.

It seemed further, plain enough, that on the 1st of January, 1811, Samuel King had executed a deed by which, for the *professed* "consideration of the sum of $10,000 to them in hand paid," he and *his wife* had transferred to this same Vint four-fifths of their interest in the estate of William King, brother of the said Samuel; the remaining fifth having, as the deed declared, been conveyed by them to Allen, in the way already mentioned, as compensation to counsel, in attending to the suits to establish the rights of the heirs.

The wife's execution of this deed, as it was produced, was by a mark. The execution of this deed was not witnessed, nor did the deed itself state where it had been executed, that is to say, whether in Virginia (at Abingdon or Saltville), where Allen lived, or at Somerset, in Kentucky, where King and his wife, the grantors, lived. But it appeared that on the 29th of January, 1811, that is to say twenty-eight days after the day stated in the instrument as the date of its exe-

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cution, the instrument had been acknowledged by King and his wife in Somerset, Kentucky, where King and his wife lived, and by *King* then given to the recorder there for record, and afterward by the recorder returned to *King;* Vint not anywhere appearing in this transaction.

Pulaski County, in Kentucky, in which State the lands conveyed by this deed did not lie, was not the proper place for the record of the deed of King and wife to Vint. The deed was not proved in Washington County, Virginia, where the lands did lie, till the 25th of September, 1837.

With this statement by way of *proscœnium*, we will now state the pleadings and further developments in the case:

In January, A.D. 1825, during the pendency of the litigation in some of its forms, about the estate of the original owner of it, William King, who, as we have already said, died in 1808, a bill was filed in the Circuit Court of the United States by some of the heirs to obtain a partition of the lands not incumbered by the widow's life estate, and on the 25th of April, 1836, after the last of the decisions in this court, an order was entered appointing commissioners to make this partition. These commissioners afterwards made a report, and, among other things, assigned to the children and heirs of Samuel King, and the children and heirs of Hannah Allen, the wife of John Allen, one-fourth the property divided.

On the 24th of September, 1838, Vint filed an original bill against the heirs of Samuel King and the heirs of Allen and wife, in which he set forth substantially that each had become owners of one-eighth of the estate of William King, of Abingdon, and then alleged that he was the owner in fee of their interest in the estate. He stated that his title to the Allen interest and one-fifth of the King interest was obtained by the already mentioned deed from Allen and wife, dated November 16th, 1810, in which, for the consideration of $18,901.27, they conveyed the same to him; and that his title to four-fifths of the King interest was by the already mentioned deed from King and wife, dated January 1st,

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1811, in consideration of $10,000, executed and recorded in Kentucky. Of both these deeds, their tests, probates, &c., he appended copies to his bill. But he appended nothing else; nor did he state or intimate in the bill, or by anything appended to it, that the transactions were in reality in the least other or different than what a reader would infer from reading the two instruments themselves. He stated rather, on the contrary, that he did not desire a suspension of the proceedings in partition any further than was necessary to protect his rights, and *that he was willing to accept the lands set off to the heirs as and for his share.* And the prayer of the bill was to the effect that he might be substituted for these heirs in the partition proceedings, *and that whatever was assigned to them might be adjudged to him.*

In September, 1839, all the defendants answered the bill, and in substance stated that they were very young when the transactions referred to occurred, and that they had no personal knowledge as to the matters in controversy. They denied generally all the allegations in the bill adverse to their interests, and suggesting many serious grounds of suspicion against the validity of the claim of Vint, demanded from him full and express proof of all the material averments of his bill, and especially for proof *of the fairness of the deeds, and of the full payment of the consideration thereof, and of the circumstances of the execution of the deeds and the alleged payments.* The death of the widow of William King, the original owner, was also suggested, and the heirs of Samuel King stated that they had conveyed their interest to a certain Findlay.

On the 19th of September, 1839, Vint filed his supplemental bill, making Findlay a party, and also alleging the death of the widow, and asserting his right to the interest of Samuel King and Hannah and John Allen in the property devised to her for life and assigned to her for dower. In this supplemental bill he stated as follows:

"Your orator cannot suppose that it will be necessary for him to allege or prove the payment of the consideration, acknowledged in solemn form by the parties to said deeds, until the

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fairness of the transaction and fulness of consideration are impugned by proof; but your orator asserts the payment of a full and fair consideration for their interests, which were then wholly contingent. Indeed, your orator was reduced from affluence to poverty by this very consideration paid for said interests. The deed from Allen and wife was duly admitted to record in the Circuit Court for Washington County, Virginia, on the 7th day of May, 1812, and the deed from Samuel King was duly admitted to record in the County Court of Pulaski County, Kentucky, where said Samuel King resided, on the 29th day of January, 1811, and on the 25th day of September, 1837, upon proof of the genuineness of said King's signature, the said deed was admitted to record in the County Court of Washington County, Virginia. . . . Your orator did not deem it necessary to prosecute his claim by suits until the suits should be determined in which the question was made whether William King, son of James King, took under the will of William King as devisee of his real estate, or whether it descended and passed to his heirs at law. It was, moreover, useless, and would have been premature to have asserted your orator's claim in the salt works and dower property until the life estate should be determined. Your orator is advised that he has been guilty of no laches from lapse of time, since he is in full time for the partition, which has not yet been made of any part of the estate."

To this supplemental bill Findlay answered, setting up his title under the conveyance from the heirs of Samuel King, and insisting upon several defences not now material to be stated.

After the filing of the supplemental bill much testimony was taken. On the 7th of February, 1840, Francis Smith, who married the widow of William King, the original owner, gave his deposition, and in it furnished a copy of a contract, as follows:

"This agreement, entered into this 6th of April, in the year of our Lord 1812, between John Allen, of the county of Washington, in the State of Virginia, of the one part, and John Vint, of the city of Washington, in the District of Columbia, of the other part, witnesses that the said John Vint, for and in consideration of the sum of $14,450, to be paid by the said John

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Allen in the manner hereinafter mentioned, the said John Vint doth covenant and agree to transfer, make over, and convey to the *children* which the said John Allen now has and to such other *children* as he may have with his present wife Hannah, one-half of all the interest which he, the said John Vint, may have in the estate of William King, deceased, by a conveyance from John Allen and Hannah, his wife, bearing date the 16th of November, 1810, and also by another conveyance from Samuel King and his wife, bearing date the first day of January, 1811, reference thereto being had will more fully appear. It is further agreed that the said John Allen and the said John Vint shall contribute equal portions of the expenses which may necessarily be incurred in the prosecution of suits for the recovery of the estate aforesaid; but until the payment by the said John Allen to the said John Vint of the sum of $14,450, the said John Vint shall not be compelled to convey one moiety of his interest in the estate aforesaid to the children of the said John Allen by his present wife Hannah; and should the said John Allen fail to make the payment to the said John Vint of the sum aforesaid, for and during the term of five years from this date, then, and in that case, it is further agreed between the parties that this agreement shall be void and of no more effect than if it had not been entered into. Whereunto we have set our hands and fixed our seals the day and year above specified, in the presence of—

"JOHN ALLEN. [SEAL.]

"M. SHUGART. "JOHN VINT. [SEAL.]

"DAVID STOUT."

And afterwards a receipt as follows was discovered:

"Received of John Allen the sum of $11,600, it being in part pay of a contract entered into, it bearing date the 6th day of April, 1812, it being on account of the estate of the deceased William King. It being for the benefit of the said Allen's heirs, the 7th April, 1812.

"$11,600. "JOHN VINT."

This same witness, Francis Smith, testified further that having heard from Vint that John Allen, with whom he, Smith, had a quarrel, was about to perpetrate through forgery a fraud upon him, he got Vint to make a certain

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affidavit. This affidavit was annexed to Smith's deposition, and, in the part material to this case, was thus:

"This day came John Vint before me, John Gibson, a justice of the peace for Washington County, Virginia, and made oath, that on the 16th November, 1810, he purchased *from John Allen* all his interest in the estate of William King, deceased, and after that purchased from *said Allen all the interest of Samuel King in said estate,* for which he was to have given, and did give, said Allen credit on a debt due from him to this affiant for $10,000; but that said Allen then stating that he wished the receipt executed by this affiant to be for a larger sum than the sum really given in order to promote his credit to the northward by the largeness of the payment he was making his creditors, this affiant agreed thereto, and executed his receipt for about $8000 more than the sum he was to give. Thus the business stood until April, 1812, when this affiant entered into another contract with said Allen in writing of that date, by which contract he sold and agreed to convey to the children of John Allen, by his wife Hannah, one-half of all his interest in William King's estate upon the payment by John Allen to this affiant of $14,000.

"JOHN VINT.

"Subscribed and sworn to before me this 5th September, 1812.
"JOHN GIBSON."

Other testimony was from time to time taken in the cause, and finally, in December, 1842, the heirs of Hannah and John Allen filed their cross-bill, in which they stated, that since the filing of their answers they had learned other facts most material in their character, and having an important bearing upon their rights and interests. They averred that these facts, "though necessarily well known to complainant (Vint), since he was an actor, and is the only surviving actor in the transaction, he has thought fit, from motives which cannot easily be misunderstood, to suppress." After referring to their extreme youth at the time the transactions occurred, and other circumstances likely to prevent their becoming acquainted with the facts, they set forth the foregoing contract and receipt, which had then recently been discovered in their search after the truth of the case. They

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then charged that the failure of Vint to bring these matters to the knowledge of the court was such a fraud on them as must deprive him of the aid of a court of conscience in the premises, and claimed that under the circumstances of this case the payment of the balance of the purchase-money due upon the contract should be presumed. They prayed:

1st. For a cancellation of the deed from Allen and wife to Vint; or,

2d. If that could not be granted, a specific performance of the contract; or,

3d. A return of the purchase-money shown by the receipt to have been paid.

To this cross-bill Vint answered in September, 1843. He denied all charges of fraud and improper suppression of truth, and then said:

"The respondent fairly purchased and paid for the interest of John Allen and Hannah, his wife, and of Samuel King, in the estate of William King, deceased, and by deeds duly executed the said parties regularly conveyed their interest to him. For these deeds reference is here made to the exhibits filed by this respondent to his original bill. Some time after these purchases and the execution of said conveyances, it is true that this respondent did make with John Allen the contract of the 6th of April, 1812 (given, *supra*, pp. 431–2), but Allen did not pay him the purchase-money within five years, or at any time, and having failed to do so, the contract became void. He admits the execution of the receipt, and alleges that beyond this there could be no pretence of any payment. He denies that he received all the money mentioned in that. He recollects distinctly that as part of the sum embraced in the receipt, a draft on John Jelf for $2333 was included, and that it was protested and never paid. A part of the sum also was made up of debts of Vint, which Allen assumed to pay for him but never did pay."

He then said:

"The contract on which the $11,600 aforesaid purports to have been paid and the receipt for that sum, were not retained by this respondent in his hands, as the complainants would seem to indicate, but were handed over to John Allen; and as the said

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Allen and his heirs are interested in the said papers, this respondent supposed that they would take care of them, and at all times have them at their command. This respondent has certainly never had the said papers under his control, and this having been the case, it seems extraordinary to him that the complainants should gravely charge him with improperly concealing contracts and papers which they must have known were never in his possession."

On the 17th of April, 1844, Findlay filed his cross-bill against Vint, in which he asked that the deed from Samuel King to Vint might be set aside for fraud. In this bill he charged that the deed was obtained by the fraudulent combination of Vint and John Allen to divest King of his interest in the estate, and stated that proof had already been made in the case that Vint had said he purchased this interest from Allen. He then stated that the actual consideration for the deed was $6000, payable in ten equal annual instalments, for each of which a note was given. That none of these notes had been paid, and that Vint had nine of them in his possession. He charged that they were unfairly obtained by Vint, and probably in consequence of his dealings and combination with Allen. He called for an answer under oath.

To this cross-bill Vint filed an answer on the 8th of April, 1845, in which he adopted as part of it the answer which he had before filed to the cross-bill of Allen's heirs. He denied that the deed to him was obtained by fraud. He said that he could not undertake to say with certainty whether or not John Allen exerted any material agency in bringing about the sale by King, but denied all fraudulent combination for that purpose. He admitted that no money had been paid by him to King, and that the consideration was as stated in the cross-bill, and he appended copies of the ten notes. All of them were payable in negroes, in Abingdon, at cash price. The three first falling due were payable to King, *or his order*. The others to the *children of King by Patsey, his wife*. The execution of all was witnessed by John Allen. A receipt as follows was produced and made part of his answer:

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"January 1st, 1811. Received of John Vint three notes, each $600, and seven notes to my heirs, each of them $600, and likewise a conveyance of all my right and title to the estate of my deceased brother, William King. Now, let it be understood, that I am to forward to John Allen, of Abingdon, said conveyance to said Vint, all my right and title to said estate, legally and completely done by me and my wife, or else said notes, in number, ten, amounting to $6000, payable by instalments, as the said notes will show, all of them and each of them to be void and of no effect if the conveyance is not forwarded in three months. If so the notes to be good.

"SAM. KING.

"Attest: JOHN ALLEN,
HANNAH ALLEN."

He then said that in pursuance of this agreement King did execute the deed in Kentucky, and that under it he claimed title. He then said that Allen procured from King nine of the ten notes and delivered them to him, and that the amount of these notes was included in the receipt for $11,600, stated on p. 432, as part pay of the contract between himself and Allen, of the 6th of April, 1812; and that he received the notes in good faith from Allen, supposing that Allen had obtained them fairly from King. *The notes were yet unindorsed by any one.*

One of them—one of the three payable to King, and the one that first fell due—was assigned by indorsement made on it by King, and dated January 2d, 1811, to Allen, and by him to one Sheffey, who had been counsel for the heirs in their suits about the property of William King.

He appended to his answer three exhibits intended to show the state of accounts between him and Allen, April 6th, 1812. They are not necessary to understand the case as relied on by the court, which rests its judgment, as will be seen hereafter, on the leading facts of the case already disclosed. But they are specially adverted to in the argument of counsel for the defendants—the heirs of Mrs. Allen—who relied not only on the leading facts of the case but on the details of it, which, as they conceived, explain and heighten the effect of the leading facts. They are, therefore, here inserted:

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EXHIBIT No. 1.

ABINGDON, April 6th, 1812.

JOHN ALLEN TO JOHN VINT, DR.

To my note given to Francis West, for	$300 00
Interest up till this date, ...	42 00
Do. three notes: one to J. Harper, one to R. Preston, and one to J. McCrab, amounting to $1133.34, which I lent my name for. At that time Mr. Allen had the money in his own hand, ...	1133 34
Interest on the above, ...	56 60
Do. one note of mine which gave to Mr. Allen in favor of Samuel King for $600, *which I paid Mr. Allen, 1st June,* 1811; *the said note was due the 1st day of January,* 1812, . . .	600 00
Interest on the above note, ...	34 00
Do. I paid Mr. Allen the sum of	166 00
	$2331 94

JOHN VINT.

I acknowledge the above accounts to be just and true.

JOHN ALLEN.

EXHIBIT No. 2.

"This agreement, made June 20th, 1812, between John Allen and John Vint, witnesseth, that the said Allen and Vint did agree on a settlement on the 12th of June, 1811, that the said John Vint did pay John Allen in full for four notes, mentioned. [The four notes to West, Harper, Preston, and McCrab, mentioned in the Exhibit No. 1, were here specified]; *and one note drawn by the said Vint in favor of Samuel King, for* $600, *due the 1st day of January,* 1812. The above notes, amounting to $1733.34, which I, John Allen, received pay in full for the above in full, from John Vint, on the 12th June, 1811.

"Now, if the said Allen pay and discharge the within debts, with all costs and interest accruing thereon, it will be good; if not, the said Allen doth agree that if the said Vint have to pay any of the within moneys, then it is further agreed that the said Vint is to be paid out of the estate of William King, deceased, the first that is recovered by law.

"JOHN ALLEN,
"JOHN VINT."

EXHIBIT No. 3.

"April 21st, 1812. This is to certify that I received of John Vint one mare, for $166, on the 26th of October, 1811; also,

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ditto, at error in calculating interest, to the amount of $200; the above sums amounting to $366; which sum is to be discounted out of the said Vint's receipt which he gave to my heirs on the account of the estate of William King, deceased.

"JOHN ALLEN."

Vint died in 1847, and the cause was afterwards duly revived; one Buchanan, his executor, being made a party in his stead.

The testimony being closed the cause was heard, and on the 24th September, 1853, a decree rendered:

1st. Annulling the deed from King to Vint and ordering a reconveyance; declaring that no conveyance was ever made by King to Allen of the one-fifth of his interest; adjudging costs in favor of Findlay and the heirs of King against Vint's representative.

2d. Denying the prayer of the cross-bill of Allen's heirs for a rescission of the deed from Hannah and John Allen to Vint; denying the prayer for a specific performance of the contract of April 6th, 1812.

3d. And ordering that the personal representative of John Allen be made a party, with a view to the determination of the question presented by the further prayer of the cross-bill for a return of the purchase-money paid upon this contract. The ground of this last order was that the court did not have before it all the parties necessary for the purpose of making a final disposition of the whole cause.

On the 21st of November, 1872, the cause was again heard and the cross-bill of Allen's heirs finally dismissed. From that decree this appeal was taken, by Crosby and others, Allen's heirs; the heirs and representatives of King being satisfied, of course, with what had been done in respect to them, and neither they nor the representative of Vint making an appeal.

Messrs. J. A. Johnson and J. A. Meredith, for the appellant:

I. *The court below as a court of equity, in which capacity it acted, had no jurisdiction.*

The bill of Vint does not ask partition, but refers to a

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suit for partition pending in the same court, in which a division had already been made, and declares that the complainant is willing to abide by that division, and that the subject of controversy in the suit is the part of the estate of William King, of Abingdon, claimed by the descendants of Samuel King and Hannah Allen, &c. The bill, then, is an application on the part of Vint to a court of equity, to say whether he or the heirs of Samuel King and Hannah Allen had the better title to the real estate assigned to the said King and Allen in another suit. Vint was not and had not been in possession; his claim was not recognized as valid, but rejected as invalid by all the persons with whom he pretended to be tenant in common. Now, a bill which does not ask partition—which says it has been made in another suit—which asks the court to decide a question of right to a particular parcel of land—which prays that possession be given of what is held adversely by others—is in fact an action of ejectment and not a bill for partition. That must relate to an undivided estate, and must ask that the interests of each be separated from the others.

II. *But concede that jurisdiction exists, the decree below was wrong.*

1. *All Vint's bills should have been dismissed for laches.*

He obtained from King and wife their deed in January, 1811, and the deed from Allen and wife in April, 1812, but he did not institute this suit until September, 1838. In the meantime a suit was pending for the construction of the will of William King, upon which depended the value of the shares conveyed by these two deeds. He did not make himself a party to these suits, claiming the shares of Samuel King and Hannah Allen, but he remained passive and silent until Hannah Allen and Samuel King, and every living party to these transactions was dead but himself; and then, for the first time, asserts his claim.

2. *As to the merits.*

The only question is as to the Allen share; that is to say, as to Mrs. Allen's eighth part in her brother's estate. The deed of King conveying his eighth, has been decreed to be

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fraudulent and null; and from this decree Vint's representative makes no appeal. The fraud of Vint as to that part, therefore, stands confessed.

Our allegation, however, is that the two deeds, and the contract of April 6th, 1812, to reconvey on payment of $14,450, and the receipt of April 7th, 1812, for $11,600 (*supra*, page 432), form parts of one transaction, and that the deed from King having been decreed to have been obtained by fraud, the other deed and papers fall as fraudulent also.

On this account only do we advert to the now effete and worthless deed from King and wife to Vint.

Our allegation further is that Vint asserting a large, and probably grossly excessive claim ($10,000) on Allen, for the sale of store-goods to him, and Allen being insolvent or nearly so, and meaning to put his own life estate in his wife's eighth of her brother's property beyond the reach of creditors other than Vint, these two persons—Vint and Allen—entered into a fraudulent conspiracy by which,

1st. Vint should get, through Allen's efforts, King's eighth, and cancel the debt of $10,000 which he alleged that Allen owed him, and by which,

2d. Allen's life estate, under the devise of a provision for his children, should be withdrawn from his creditors other than Vint; and by which,

3d. Under the same device the interest of Mrs. Allen, the owner in fee—an interest which neither Vint nor any other creditors of Allen could touch—should pass to Vint as security for the payment of a balance due to him by Allen on other accounts, and shown by the exhibits Nos. 1, 2, and 3, *supra*, pp. 437–8.

We assert that the deed of King to Vint, dated January 1st, 1811, was procured by *Allen's* influence; that it was executed at Allen's house in Abingdon; that Vint's notes for $6000, the consideration for it were left with Allen, until the deed should be taken by King to Kentucky, be executed and acknowledged there by Mrs. King, and be returned to Allen; that Allen kept Vint's notes till January 1st, 1812,

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that he then gave them to King; that King had them in his saddlebags when he was murdered or disappeared soon afterwards; that Allen then became repossessed of them and surrendered them, all except one (against which Vint was subsequently indemnified, in the way mentioned in Exhibit No. 2, *supra*, p. 437), to Vint, and that Vint thereupon cancelled his claim on Allen for store-goods; Vint thus getting King's eighth of the estate of the original owner, his brother, for nothing but his (Vint's) surrender of a claim of $10,000 on Allen, a man quite insolvent; a claim, therefore, which was good for nothing.

Now to prove our position.

The deed from King and wife to Vint bears date January 1st, 1811, on which day King was doubtless at Abingdon to get his annuity. All Vint's notes, the consideration for the deed, are witnessed by Allen, who resided there, but who is not shown to have ever been in Kentucky. One is transferred to Allen on the next day, January 2d, 1811. The deed is not witnessed, because it purported to be by King and *his wife*, and the wife was not there to execute it. It was acknowledged by King and his wife in Kentucky on the 29th of January, 1811, when obviously King had just returned home; and by *King* was then given to the recorder for record, and by the recorder after record returned to *King;* Vint nowhere appearing to have had possession or control of the instrument at all. King in his receipt (*supra*, p. 436) promises to forward the deed when "legally and completely done" by him and his wife, to Allen; and Vint in his affidavit given to Francis Smith (*supra*, p. 438) says in terms, that "he purchased from *Allen* all the interest of Samuel King, for which he was to have given and did give said *Allen* credit on a debt due this affiant (Vint) for $10,000."

It is apparent, therefore, that Allen was the person who brought this conveyance and so-called sale about; that he did it by means of a deed made directly from King and wife to Vint, executed under pretence that King was about to get Vint's notes for $6000, which notes were doubtless left

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in Allen's hands under a promise that they should become King's when the deed should come back or be brought back from Kentucky properly executed by the wife, and properly acknowledged; it having, however, been understood between Allen and Vint, that Allen would indemnify Vint against any liability on these notes, and that the true consideration was the surrender of the claim of $10,000 on Allen for store-goods sold in 1810 or thereabouts. There was no risk in this to Vint, for if he ever should be made to pay the notes, he had acquired an estate far above the amount of them; while as to his claim of $10,000 on Allen it remained where it was.

But the understanding between Vint and Allen *was* carried out. Vint did in a subsequent transaction with him, and where he paid really nothing for them, get back from Allen all the notes but one, and against that one he was indemnified, as appears by the Exhibit No. 2, *supra*, p. 487.

It may indeed be that, the *original* purpose as to King was but to get his one-eighth of an estate worth $500,000, for the grossly inadequate consideration of the ten notes payable through a term of ten years in negroes, and that the more shocking scheme which in April, 1812, was actually accomplished, was not devised until after Allen had got repossessed of Vint's notes after King's death. The exact time when the fraud actually perpetrated was concocted is not important.

We assert now further, that Allen after King's death became possessed of these nine notes of Vint by fraud.

Our theory is that the notes of Vint never left Allen's hands till January, 1812. It is not likely that Allen would have parted with the notes before the deed came back from Kentucky. Possibly the deed never did come back till King came back himself on the 1st of January, 1812, to get his annuity, and that he then brought it back himself. If King had received the notes prior to leaving Abingdon for his home in 1812, his family would have had them. He would not have brought them back to Abingdon January 1st, 1812. But the notes are found April 7th, 1812, in Allen's posses-

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sion. How did Allen have them then? There is but one way of accounting for his possession of them. King, we know, disappeared—was murdered or destroyed himself—just after leaving Allen's house, in the beginning of 1812. Whether Allen murdered him or whether he destroyed himself will never be known with certainty, until that dreadful day when the secrets of all hearts shall be disclosed. But this we know now—that King's last utterances were that he "was afraid of a man named John Allen and other persons who were pursuing him." And if drink had made him mad it does not follow that in his idea there was not a truth "that often madness hits on which reason and sanity could not so prosperously be delivered of."

But whether Allen murdered King or not, we know that King's saddlebags, containing papers, were sent, not to his own family in Kentucky, to whom they ought to have been sent, but to Allen's family at Abingdon. What papers were these? As King is shown to have possessed no other property than Vint's notes, and as these notes never came to the possession of King's family, and as on the 7th of April, 1812, they are found in Allen's possession, the presumption is violent that the papers were nine of Vint's notes given for the purchase of King's eighth. The tenth one Allen had already by King's indorsement.

We now come to the 6th of April, 1812, and more particularly to the Allen eighth. Possessed of these notes of Vint, in the spring of 1812, and King's deed to Vint having been duly executed and acknowledged, Allen is ready to carry out with Vint a full scheme; whether one devised originally to the full extent in which it was now executed, or in that full extent now first conceived and carried out, is unimportant.

And here it is to be noted that the deed of Allen and wife to Vint, though executed November 16th, 1810, does not appear to have left Allen's possession at that time. It was not acknowledged at that time, nor then recorded. On the contrary, on the 27th of April, 1812, eighteen months after its execution, two new witnesses attest it at the request of

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Allen; and it is not proved for record until the 7th of May, 1812.

At this time Allen was not indebted to Vint except in a small amount shown by the Exhibits Nos. 1, 2, and 3. Vint admits in his affidavit made for Francis Smith, that his claim of $10,000 had been paid by Allen's sale to him of King's eighth.

The parties, therefore, except as to a small debt from Allen to Vint, as shown by Exhibits Nos. 1, 2, and 3, were unindebted to each other; each with one-eighth of the original estate, but Allen holding in his own hands a deed by which he conveyed his and his wife's eighth to Vint. The parties were confederates, and dependent on each other. Each knew the fraud of the other. They now fell upon this device. Allen delivers to Vint the deed from himself and wife, conveying their interest to Vint, *in consideration whereof* Vint executes the contract of the 6th of April, 1812, by which Vint agrees to convey to the children of John Allen and Hannah his wife "one-half of all the interest which he, the said John Vint, may have in the estate of William King, deceased, by a conveyance from John Allen and Hannah his wife, bearing date the 16th day of November, 1810; and also by another conveyance from Samuel King and wife, bearing date the 1st day of January, 1811."

Vint did not stipulate to reconvey to Allen's children the same interest that had been conveyed to him by Allen and wife. If he had done so, the fraud would be apparent upon the face of the two papers. But as this contract bore date two years subsequent to the date of the deeds, it had the appearance of a new contract, one distinct from that of the deeds; and as this appearance would be strengthened by the conveyance of a different interest, they fell upon the device of conveying to the children a moiety of each of the interests conveyed to Vint by each of the two deeds. They sought to strengthen further this appearance of fairness by the nominal consideration of this contract. It will be observed that the consideration to be paid Vint by Allen is $14,450.63, which is precisely the half of the two sums men-

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tioned in the two deeds as their respective considerations.* The contract contained a clause that there should be a forfeiture of the contract if this sum was not paid in five years.

If the arrangement had stopped here Allen would not have got anything. Before he could have demanded the reconveyance, he would have had to pay $14,450.63, the estimated value of the interest. It would have been better for him, instead of doing this, to have permitted his life-interest to be taken by his creditors; since the fee simple would have still remained to his children through their mother. It became necessary then to resort to another device to relieve Allen of this dilemma; and the device resorted to was this. Vint on the 7th of April, 1812—one day after the date of the contract—gives a receipt to Allen for nearly the whole amount of the nominal consideration; acknowledging the receipt of $11,600, in part pay of the contract entered into on the preceding 6th, and declaring it to be on account of the estate of William King, deceased, and for the benefit of John Allen's heirs.

It is admitted by Vint that the amount of nine of the notes given by him to King and now surrendered by Allen, was included in the $11,600, and that he supposed that Allen came by them honestly. That this is false is plain. The notes were unindorsed by any one. As to those payable to King's children, as the children were infants, they could be assigned only by order of court. When Vint received the notes he must have known them to have been stolen. Allen was the thief and Vint was the receiver of the goods.

But to resume our history. After deducting the amount of the receipt from the nominal consideration expressed in this contract, there then remained a balance due from Allen, which he would have to pay before he could demand a conveyance from Vint of the interest stipulated for in the contract of 6th of April, 1812. The reason why the receipt did

* In the deed from King to Vint, the consideration is the sum of $10,000. In the deed from Allen to Vint, the consideration is the sum of $18,901.27; the one-half of which is $14,450.63, the consideration named in the contract of the 6th of April, 1812.

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not cover the whole nominal consideration, but left this balance due, is explained by the circumstance that Allen was indebted to Vint on other transactions, which amounted to nearly this balance, and which were produced by Vint on that day in an account rendered, and dated the 6th of April, 1812, the date of this contract, with the interest calculated on the several items down to that day, which amount was acknowledged by Allen to be due. See the Exhibit No. 1, *supra*, p. 437. The amount due on this account added to the amount due on another account settled between the same parties, amounted to about $2600 (as appears by the Exhibit No. 3, *supra*, pp. 437–8), leaving a difference between this sum and the balance due as aforesaid on the nominal consideration of the contract of 6th April, 1812, of about $250. This difference was made by Vint, doubtless, with the intention to cover the interest that would accrue on the sum actually due between this day and the time when he would receive enough from William King's estate to pay it. By thus retaining this balance on the nominal consideration of this contract, it furnished Vint security for the amount really due him from Allen on these other transactions, and forced Allen to pay it before he or his children could get anything from the estate of William King under the contract of 6th April, 1812. This debt of Allen to Vint is again acknowledged by Allen on the 20th June, 1812, in Exhibit No. 2, *supra*, p. 437, and a lien given on his interest in William King's estate. He then had no interest except that secured by the contract of 6th April, 1812.

The case establishes, we submit, the following conclusions:

That the deed of Allen and wife was not delivered to Vint until the contract of the 6th of April, 1812, and the receipt dated on the next day, were signed and delivered by Vint to Allen, and Allen delivered to Vint the notes which Vint had given to King; that the interchange of these papers was contemporaneous, and consequently that the said contract and receipt and the delivery of said bonds constitute the real consideration of the deed from Allen and wife to Vint; the consideration consisting in part of King's interest, pro-

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cured by the combined fraud of Vint and Allen, which renders the deed from Allen and wife to Vint fraudulent and void. The extent to which this interest of King formed a part of the consideration, is not to be measured by the moneyed value of that interest at the time. It was the controlling inducement which led to the delivery of Allen's deed and the execution and delivery by Vint of this contract and receipt.

That no moneyed consideration passed between two such men as Allen and Vint is palpable, and is admitted by Vint in his answers to the cross-bills, though in his original bill he avers that the deed from Allen and wife was "for the consideration of $18,901.27," and the deed from King and wife was "for the consideration of $10,000." He thus proves his own averments to be false. Vint has, in fact, offered no explanation as to the true consideration of that deed, but has contented himself with a vague and general averment in his answer, that he fairly paid for the interest of John Allen and Hannah his wife; and this averment is made in response to special and searching interrogatories, calling on him to state the true consideration of this deed. This evasive answer, this ominous silence, should condemn the whole transaction, and stamp it with the fraud charged in the cross-bill, and not explained by a party cognizant of every circumstance, and the only party to these transactions then alive, and alone able to give the explanations called for. This, in a court of equity, is an admission of the fraud charged. To this should be added the facts that he suppressed the contract of the 6th of April, 1812, and the receipt of the 7th of that month, and claimed the whole of these two interests in his original and supplemental bills; and that every living party to these transactions, except Vint, was dead, when he filed his bill, twenty-seven years after the transactions occurred, asserting claim under the deed from Allen and wife and King and wife.

Messrs. H. H. Wells and L. H. Chandler, contra:

I. *As to jurisdiction.* Vint's title at the outset depended

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upon the construction of a trust exclusively within the jurisdiction of a court of equity. The relief which he asked was a partition and a restraining order or injunction against the assignment of any portion of this estate to the heirs-at-law of King and Allen. The established rule is that it is not enough that the party has a possible remedy at law, or even a convenient remedy, but that to divest the equitable jurisdiction of the court, the legal remedy must be an adequate one, and it must be as convenient as the remedy that a court of equity affords.* In fact, as Vint's title was but equitable —the legal estate having been decided by this court to have been in the nephew†—he could not have maintained ejectment.

In addition, the case does not stand upon the original and supplemental bill, but the defendants have filed cross-bills, impeaching for alleged fraud the conveyances under which the complainant claims. The complainant has answered. Issues peculiarly appropriate for chancery have thus been raised by the families of Samuel King and Mrs. Allen.

II. *Assuming that jurisdiction to review exists, how much of the case below is to be reviewed?* No part, we suppose, but that relating to the purchase-money paid upon the contract of April 6th, 1812; the question whether it was paid. The decree made in 1853 was final. It decreed that the deed from Allen and wife to Vint, dated November 16th, 1810, was valid; that the deed from King and wife to Vint, dated January 1st, 1811, was void, and denied the prayer of the cross-bills for specific performance of the contract between Allen and Vint dated April 6th, 1812. Those were the only questions which the pleadings, as they then stood, did, or could in fact raise. No other question touched in any manner the title to the property, nor has any question since been presented affecting that title. In short, the decree of 1853 decided the right of property in contest, and no appeal having been taken from that decree for nineteen years, this

* Oehlricks v. Spain, 15 Wallace, 228; Boyce v. Grundy, 3 Peters, 215.
† See *supra*, p. 422.

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court is now without jurisdiction to review it.* The complainant was entitled to have that decree immediately carried into effect.

III. If, however, the decree of 1853 was not final, and the same, so far as respects the Allen part, is now subject to review, we say that there was no error in the decree.

1. There were no unexplained *laches*.

Until the determination of the question, whether Samuel King and Hannah Allen took any estate under the will of their brother, there was no necessity, nor any propriety, in fact, in Vint's instituting a suit to recover the property.

In the ascertainment of that question there was no delay, because a suit was pending and not decided, in this court, until 1880. Vint did not make himself a party to that suit, and could not, because it was an action of ejectment to recover possession of a definite portion of the estate which had not been apportioned or divided, and in which Vint had no right to any particular part; nor was there any necessity that he should do so, because the suit being between parties from whom Vint, Allen, and King's heirs alike claimed title, they were all privies, and would be bound by the judgment of the court therein.

2. *As to merits.* The whole of the opposite case rests on the assumption that King was at Abingdon January 1st, 1811, under Allen's influence, and that Allen by fraud and duress coerced him to make the deed to Vint. But—

1st. When King came, in 1812, to claim his annuity, he claimed annuity for two years; one due January 1st, 1811, and the other due now, January 1st, 1812; and Allen told him that under his brother's will he could not get the one for January 1st, 1811, because he had not then claimed it. The fact that he did not claim it on the 1st of January, 1811, tends to show that he was not at Abingdon at that date.

2d. The deed made January 1st, 1812, is by Samuel King and *his wife*. It is not shown nor alleged that she then or ever left her home in Kentucky.

* Thompson v. Dean, 7 Wallace, 342; Railway Co. v. Bradley, Ib. 575; Stovall v. Banks, 10 Id. 583.

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The case of the opposite side assumes, in addition, an enormous scheme of fraud. When such a scheme is relied on—a gigantic scheme, involving an immense mechanism, carried on by two parties through two or three years—plain proof should be made, at least of the leading facts. Such proof is not made. Because such a scheme is imaginable by an active fancy and is actually imagined by the opposite counsel, it does not follow that Vint and Allen imagined it, still less that they carried it out.

Reliance is placed in the argument of opposite counsel upon the fact that Vint "suppressed"—that is to say, that he did not produce and set forth in his bill—the contract of the 6th of April, 1812, and the receipt of the 7th, and that he claimed the whole of the two-eighths.

The argument assumes that those two papers not only were really, but also that they were known and felt by Vint to be, at the time that he filed his bill, still operative and obligatory papers; assumes, in other words, that he meant in filing his bill to commit a fraud. But is not that a matter to be proved? By the terms of the contract the rights of Allen's children under it ceased, unless the contract on their side was carried out within five years; that is to say, unless it was carried out by the year 1817. Was it, in truth, A.D. 1838 an obligatory paper? The question raised one of the nicest points in scientific equity; that is to say, how far time is of the essence of a contract? The general rule is that a party who comes into equity to enforce a contract must not have been guilty of laches, and that on the contrary he must have shown himself "ready, desirous, prompt, and eager." There was raised, in addition, and independent of the matter of time, the difficult question of mutual and dependent covenants; and how far the failure of Jelf to pay his note for $2333, which had been received at the time as cash, and how far the failure of Allen to pay certain debts of Vint's which he had promised to pay for him, reduced the receipt of April 7th to nothing. These things, according to Vint's answer to the cross-bill of Allen's heirs, largely made up the receipt. Was Allen, in filing a bill A.D. 1838,

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plainly and necessarily bound to know and to feel that the paper still bound him? If he was not, he was not bound to say anything about it. A pleader is expected to state his own case, and to state it as strongly as he can. He is not bound to anticipate all objections to it and then to show those objections to be unfounded. Suppose that in fact the contract did not, owing to lapse of time, bind him when he filed his bill. What would have been thought of a bill which, after setting out the deed to Vint, then added: "It is true indeed that there was a contract? &c.;" . . . and, after setting out the contract *in extenso*, then went on to show perhaps *in extensiori*, for each severally, a hundred and one reasons why it had no longer any force? Who ever heard of such pleading, either at law or in equity? It would have been in plain violation of the fundamental rules of pleading; rules as ancient as the common law itself,* and taught in elementary text-books.† When treating "Of the Principal Rules of Pleading," Serjeant Stephen gives one thus:

"3. *It is not necessary to state matter which would come more properly from the other side.*"

And, commenting on it, says:

"The meaning is, that it is not necessary to anticipate the answer of the adversary; which, according to Hale, C. J., is 'like leaping before one comes to the stile.'‡ It is sufficient that each pleading should in itself contain a good *primâ facie* case, without reference to possible objections not yet urged."

The transactions to be passed on are very ancient, complicated, and obscure. Matters may have got mixed up. The consideration of one deed may have been mistaken for that of another. Vint's notes were perhaps not the consideration for the deed from King. Proofs cannot be given as of recent things. It is plain, however, that Vint did have property in 1810; a large assortment of store goods. The

* See Stowell v. Lord Zouch, Plowden, 376; St. John v. St. John, Hobart, 78; Holham v. East India Company, 1 Term, 638.

† Stephen on Pleading, Tyler's edition, Washington, 1871, p. 315.

‡ Sir Ralph Bovey's Case, 1 Ventris, 217.

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witnesses, Russell and Stout, both prove this by their testimony, *supra*, pp. 425–6. Allen was reported to have bought these goods. No doubt he did. It is plain, too, that they had other transactions. The exhibits, Nos. 1, 2, and 3, *supra*, pp. 437–8, show this. Suppose that Vint was at one time in jail. Does that prove that he may not have previously had control over a large amount of goods and sold them to Allen? He may have been imprisoned for the price of those very goods. And how does the fact that Allen was in jail with him bear on the case? it being confessed that Allen owned a life estate in his wife's eighth of her brother's estate, and that she owned the fee, and both having conveyed to Vint?

Even if Vint had wanted candor in not stating the fact of the contract and receipt, of April 6th and 7th, how does that show that the deed of the 6th was without consideration?

The CHIEF JUSTICE delivered the opinion of the court.

The first question we are to determine is as to the extent of our power over the several orders and decrees of the court below. The appellees claim that it is confined to an examination of the question of the return of the purchase-money paid upon the contract of April 6th, 1812, while the appellants insist that the appeal reaches back and includes the decree of September 24th, 1853, so far as it relates to that part of the case in which they are interested. All agree that our inquiries are limited to the Allen title. The King title was disposed of adversely to the appellees in 1853, and they have not appealed.

In 1853 the court determined that it would not decree a cancellation of the Allen deed, and would not order a specific performance by Vint of his contract. This determination it caused to be recorded, but at the same time declared that it could not then make a final disposition of the whole cause, because it did not have before it all the parties necessary for that purpose. In 1872, when the cause was ready for final hearing, the court accepted this recorded opinion

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as settling the rights of the parties, so far as it went, and then proceeded to consider the question which had not been determined. Upon this hearing that question was decided against the complainants in the cross-bill, and then a final decree was entered denying the relief asked by the defendants. This ended the case in the court below.

Cases cannot be brought to this court upon appeal in parcels. We must have the whole of a case or none. The court below must settle all the merits before we can accept jurisdiction. Appeals will lie, as has been frequently held, when nothing remains to be done except to enforce and give effect to what has been decreed, but until all the rights of the parties have been finally passed upon and settled this cannot be the condition of a cause. Nothing must be left below when an appeal is taken but to execute the decree.

That was not the condition of this case in 1853. An appeal then would have left the question of the return of the purchase-money undetermined. The rights of the parties as presented by the pleadings were not all settled. The powers of the court below were not all exhausted. If the remaining question had been settled in accordance with the prayer of the cross-bill the present appellants might have been satisfied and the appeal saved.

We are, therefore, of the opinion that the decree of 1853 was not final so far as it respects the Allen title, and that the appeal brings up the whole of that part of the case for our consideration.

It is first insisted by the appellants that a court of equity has no jurisdiction of the case, and that for this reason the bill should now be dismissed.

So far as we can discover from the record, this objection is raised here for the first time. The transactions out of which this case arises occurred sixty-five years ago, or thereabouts. The estate of William King has been the subject of litigation in some form or other during all that time This particular suit was commenced thirty-six years ago and more. It is high time it was ended. At any rate, we

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are not inclined to add to its length of years by looking after mere form in order to avoid substance.

This brings us to the case upon its facts. The record is voluminous, but to our minds the controlling facts are few. In a court of conscience deliberate concealment is equivalent to deliberate falsehood. When a living man speaks in such a court to enforce a dead man's contract with himself against parties who he knows are ignorant of the facts, he must be frank in his statements, unless he is willing to take the risk of presumptions against him.

In this case Vint waited until both Allen and his wife were dead before he attempted in any manner to assert his claim. This he had the legal right to do. His laches is not a bar, but it is still a fact, and when it is remembered that some of the parties he is now pursuing were not born until after his rights, if any he has, accrued, this silent fact has all the effect of positive statement.

The rights of Samuel King's heirs are not before us for adjudication, but the facts upon which their rights depend cannot easily be separated from those we must consider.

Allen and Vint seem to have been almost inseparable when the transactions we are to pass upon occurred. King was a man of intemperate habits. His brother, William King, from whom the property in controversy came, made provision in his will for the payment to him of the sum of $150 annually, so long as he lived, in case he applied for it personally to the manager of the salt-works at Saltville, or the executor of the will at Abingdon, on the first day of January in each year. His personal receipt was required, and the payment for the year was to be forfeited if not called for on the day.

He lived in Kentucky, and Allen and Vint at Abingdon. His contract to sell to Vint bears date January 1st, 1811. That was the day he was required to be at Saltville or Abingdon to receive his annuity. The contract was witnessed by Allen and wife, and the notes given for the purchase-money all bearing that date, were witnessed by Allen.

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The note first falling due was assigned by him to Allen on the 2d of January, 1811, the day after its date. From these admitted facts the conclusion is irresistible that King was in Virginia when the contract was made, and that Allen must have been cognizant of it, if not active in bringing it about.

In January, 1812, King was again at Abingdon. While there he staid at Allen's house. In the month of February, or the forepart of March, he started for his home in Kentucky. He stopped for the night at a house about sixty miles from Abingdon, and was never afterwards seen. He left his saddle-bags at the house where he stopped, and these were afterwards taken to Allen's house and opened by Allen's wife. When opened they were found to contain his clothing and a pocket-book. In the pocket-book were papers, but no money.

The deed from the Allens to Vint bears date November 16th, 1810, and was executed by Mrs. Allen on that day. It was not proved for record until May 7th, 1812. Its execution appears first to have been attested by three witnesses, and then, on the 27th April, 1812, at the request of Allen, by two more. The presumption is, therefore, that it had not been delivered before that time.

On the 6th April, 1812, Vint made his contract for the conveyance to Allen's children of one-half of the property covered by the two deeds. On the next day Vint executed his receipt for the payment of $11,600, part of the purchase-money. Part of this payment consisted of nine out of the ten notes given by Vint for the purchase of the King interest. It cannot for a moment be doubted that Allen had no title to these notes, and that Vint knew it. So far as appears by the testimony none of them were indorsed when surrendered, and seven out of the nine were payable to the children of King. The disappearance of King caused much excitement at the time, and was extensively known. The persons at whose house he stopped for the night had been suspected of his murder. Allen was poor, and in the summer following he and Vint were in jail together for debt. In the face of all these circumstances it is impossible to be-

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lieve that Vint told the truth when in his answer to the cross-bill of Findlay he stated that he received the notes "as he believed from one who had a right to their possession, and whose right to transfer them to him was unquestionable."

As has been seen, Allen's deed could not have been delivered until after the 27th April, 1812. The presumption is, therefore, that payment for the property had not been made previous to that time. Allen was not a man to be trusted, even by Vint, with so large a payment as the nominal consideration required without a delivery of the deed. The deed had been drawn with great care, as the scrivener testifies, because the transaction was important. If the contract had been fully consummated in good faith at its date, there can scarcely be a doubt that the deed would have been at once perfected and proved for record. This, as we think, disposes of the theory that the property had been paid for by Vint with his stock of goods in 1810. Vint did not set up any such claim in any of his answers, and most assuredly he would have done so if it had been true. Besides that, no satisfactory testimony has been adduced in support of the claim. The only witnesses who testify upon the subject speak very indefinitely, and one of them makes some statements which are directly contradicted by well-established facts. In September, 1812, Vint himself stated, in an affidavit, "that on or about the 16th November, 1810, he purchased from Allen all his interest in the estate of William King, deceased, and after that, purchased from Allen all of the interest of Samuel King in said estate, for which he was to give and did give credit on a debt due from him to affiant for $10,000." There is nothing here about a payment in goods, and besides, according to the affidavit, the King purchase entered as much into the credit as did that of the Allen interest.

But still more important is the absolute refusal of Vint to disclose the facts in his answers when directly called upon to do so. It is true that he need not make the statements unless he chose. The law under the form of pleadings in

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this case did not compel him to be more specific, but it can raise presumptions against him if he is not. He may, if he pleases, rest his case upon the acknowledgment of payment expressed in his deeds, but if he does he must take the chances of being overcome by other facts and circumstances which repel the presumption arising from such evidence. In this case the circumstances are emphatic. He slept upon his rights for a quarter of a century; he waited for every actor in the premises except himself to die; in all the litigation affecting his interests he never appeared so long as there was one alive who could speak against him from actual knowledge of the facts, and during all the time he permitted his adversaries to assume and represent his title.

But we are not inclined to pursue this inquiry further. To our minds it is clear that in April, 1812, when the transactions upon which the rights of the parties depend, were completed, it was well understood by all that the original interest of Mrs. Allen in the estate of her brother had been in some form secured to her children. It is quite possible it may also have been understood that Vint was to have a lien upon it by way of security for the payment of some debt owing to him; but it is certain, as we think, that it was never intended he should hold it as owner.

When, therefore, Vint came into court and asserted his absolute title as against the ignorant heirs of these deceased contracting parties, and wilfully concealed his contract for a reconveyance and the receipt which belonged to it, he came with unclean hands and must suffer the consequences. He does not excuse himself for this attempted fraud by pleading defect of memory, but claims boldly that he was not required to tell all he knew; that his duty was at an end when, selecting his own facts, he presented his own case. It is true he had the right to select that way of coming into court, but having deliberately made his selection he ought not to be surprised if he finds that he is received with suspicion. Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud.

If Allen and Vint were the only parties interested in this

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controversy the case would be different. They have been partners in fraud and neither can claim a preference over the other on account of honesty of purpose or fairness in dealing. But Allen's interest in the property was only that of a tenant for life. The real owner was his wife, and upon her death her children succeeded to her rights. It is the title of these children that Vint now attempts to defeat. By his own admissions in commencing his proceedings against them he concealed the truth. He thus in effect confesses that he relied to some extent for his success upon their ignorance. After years of groping in the dark, they were able to confront him with the facts and, as we think, to defeat the case he has attempted to make against them.

DECREE REVERSED, and the cause remanded with instructions to enter a decree DISMISSING THE BILL of the complainants and GRANTING THE PRAYER OF THE CROSS-BILL for a cancellation of the deed from Allen and wife to Vint.

THE RIO GRANDE.

1. In a proceeding *in rem*, a valid seizure and actual control of the *res* by the marshal gives jurisdiction, and an improper removal of it from his custody, as by an order of court improvidently made, does not destroy the jurisdiction. Hence, where, on a libel *in rem* in the admiralty for repairs, a vessel had been seized, and, on hearing, the libel was dismissed, but on the same day an appeal to the Circuit Court was moved and allowed, a motion made on the next day by the claimants, and improvidently granted, to restore the vessel to them, does not divest the Circuit Court of its jurisdiction to hear the appeal, if within due time the appeal is perfected by giving bonds in the way prescribed by statute.
2. In such a case as that above described, a decree by the Circuit Court that the vessel was a foreign vessel—an issue whether it was so or not having been raised in the pleadings—if pleaded or put in evidence in the District and Circuit Courts of another circuit, to which the case finally gets on a new libel *in rem* by the original libellants against the vessel, which, on a subtraction of it from the first district and circuit, they have pursued into a new district and circuit, and seized anew, is conclusive of the foreign character of the vessel.

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Statement of the case.

APPEAL from the Circuit Court for Louisiana; the case being thus:

In October, 1866, one Williams, a steamboat captain, purchased in New Orleans, a steamboat called the Rio Grande, and took her to Mobile, Alabama. He there mortgaged her to Stewart and Ross; and employed her in running between certain towns at the upper and lower parts of Mobile Bay; he, Williams, and not the mortgagees having possession. While she was thus employed, Otis and others, in November, 1867, libelled her in the District Court for Alabama for repairs. The libels alleged that the steamer was owned by persons out of the State of Alabama, and belonged to some port in the republic of Mexico, and that the repairs had been made on the credit of the vessel.

Williams as owner, and Ross and Stewart as mortgagees, intervened, denying that the repairs had been made on the credit of the vessel. They asserted, contrariwise, that the repairs had been made on the credit of Williams. They denied also that the vessel was a foreign vessel, or had been at any foreign port after her arrival at Mobile; asserting, contrariwise, that she was a domestic vessel engaged in running in the internal waters of the State of Alabama.

In point of fact, the evidence tended to show that the vessel had been originally a vessel of war (then named the Susanna), built for the rebel confederacy; that she had been captured during the rebellion by a vessel of the government, sent into Philadelphia and there condemned, and sold as prize to one Hazard, an American citizen, on the 18th of January, 1865; that Hazard sent her to Matamoras in Mexico, under the command of one Tyler, and had given him power to make sale of her; that for commercial purposes she was put under British colors, with a temporary British registry, which expired while she was at Matamoras; that while there she could leave the port in no other way than by obtaining a temporary Mexican registry, which was done by putting her in the name of Francisco Alcala, a citizen of Mexico, residing in New Orleans, under which Tyler brought her to New Orleans; that all this was done for spe-

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cial purposes, but that the vessel all the while was in reality the property of an American citizen; that after Williams brought the vessel to Mobile he was not allowed to register her there as his own vessel, she being held under a Mexican registry; and, finally, that the collector gave her a temporary permit and license, on the 12th day of June, 1867, to run in Mobile Bay and River, and referred to Washington for settlement the question whether she should be enrolled.

The court referred it to a master to determine whether there had been a credit to the vessel, and if so whether the vessel was a foreign one.

The master recapitulated leading facts as he conceived them on both sides, bearing on the national character in law of the vessel, some of which are above given—adding that several of the witnesses swore that Captain Williams had told them repeatedly that the vessel was bound for their wages; that she was a foreign vessel, having Mexican owners; but that Williams himself swore that he never told the libellants that they had a lien, and never represented the vessel as being in point of fact owned by any one but himself; though he had spoken of her Mexican registry.

The District Court for Alabama, on the whole case, was in favor of the claimants, that is to say, it considered that the debts set forth in the libels did not constitute a maritime lien so as to give the court jurisdiction, and dismissed the libel. This was on the 11th of May, 1868.

At the time that this decree of dismissal was rendered, and within a few minutes thereafter, a motion was made to the judge holding the court, that an appeal from the decree be allowed. The motion was granted, and an order was then and there made fixing the amount of the bonds to be given on the appeal.

On the next day—that is to say, on the 12th of May—the vessel being still in the custody of the marshal, owing to the fact of some clerical irregularity about the motion for the appeal, the proctor of Stewart and Ross asked for and obtained from the court an order of retention of the vessel to them, and the marshal having surrendered her to

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them accordingly they immediately carried her out to sea, and went off with her. The libellants, nevertheless, on the 14th and 15th of the month gave their appeal bonds in form, and they were duly accepted by the clerk.

On the case being heard by the Circuit Court, that court reversed the decree of the District Court and decreed for the libellants; holding thus both that the credit had been given to the vessel, and that the vessel was to be regarded as a foreign one. But the vessel was no longer in the marshal's possession to answer. The *res* had departed.

However, she was soon heard of at New Orleans, and the libellants instantly sent, and, libelling her there, seized and held her anew. To their libel they appended the record of the proceedings in the District of Alabama.

The Ocean Towboat Company now intervened—a company which, in September, 1869, had acquired the right of the old owner, Captain Williams, and of his mortgagees, Stewart and Ross; the right of whom had passed in some way to a Mrs. Price.

This company set up in answer to the new libel,

1st. That, at the time the libellants took their alleged appeals from the decree of the District Court for Alabama dismissing their libels, as also at the time the Circuit Court for the State just named rendered the decree now invoked, the steamer Rio Grande, proceeded against *in rem*, was neither in the actual nor in the constructive possession of either the District or the Circuit Court; but that, on the contrary, the vessel had prior thereto been restored to the claimants, Ross and Stewart, by virtue of the decree of the District Court.

2d. That from the circumstances of the case, the claimants could have nothing to urge against the libels in the said District Court of Alabama, their ownership of the Rio Grande having accrued long after the proceedings in that court had terminated, to wit, in September, 1869, and outside of the jurisdiction of the said court, to wit, in New Orleans.

3d. That all the proceedings had in said Circuit Court for

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Alabama, in the matter of the said alleged appeals, were *ex parte*, irregular, and in violation of the rules, usages, and laws of the admiralty, regulating the subject.

That as the libellants had failed to move that court to set aside the decree of restoration heretofore mentioned, or to appeal from the same; and as by reason of their laches in this regard, they had suffered the decree to be carried into effect by the marshal, they must be taken, notwithstanding their form and show of an appeal, as having acquiesced in the execution of the judgment of the District Court dismissing their libels for want of jurisdiction.

4th. That the vessel was a domestic vessel, and, therefore, not liable to a lien for repairs done to her in her home-port, whether credit was given to her or not.

The District Court dismissed the libel filed there, as the District Court of Alabama had done by the libel filed in it. On appeal, however, the Circuit Court reversed—as the Circuit Court of Alabama had done by the decree of the District Court for that district—the decree of the inferior court, and decreed in favor of the lien. The Ocean Towboat Company appealed.

It may be well here to say that the Judiciary and subsequent acts enact, in regard to appeals in admiralty from the District Court to the Circuit Court, that upon sufficient security and service of notice being given, within a certain time, to prosecute them with effect, the appeal shall be a supersedeas and stay execution. The security and notice, it seemed plain, had been duly given in this case.

Mr. D. C. Labatt, for the appellants, the Ocean Towboat Company; Mr. P. Phillips, contra.

Mr. Justice HUNT delivered the opinion of the court.

The appellants insist that at the time the libellants took their appeal from the decree of the District Court of Alabama, the vessel proceeded against *in rem* was not in the actual or constructive possession of the District or Circuit Court, but that she had been previously restored to the

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claimants by virtue of an order of the District Court, under which the marshal could justify.

But the appeal which was allowed by that court on the 11th of May, operated as a stay of all proceedings upon or under the judgment of dismissal of the libels made on that same day, and but a few minutes before. The appeal was well allowed, the bonds are in compliance with the order of the court so far as it appears, were accepted by the clerk, and were not objected to by the parties. We cannot agree with the argument of the claimant that under such circumstances the Circuit Court in Alabama had no jurisdiction of the appeal, and that its decree was void.

The appeal stayed all proceedings, and the parties were bound to keep the vessel where it then was, to wit, in the possession of the court. The appeal was taken and allowed before any order of discharge was granted, and the bonds required to make the appeal a stay of proceedings were given within the time required by the statute.

The removal of the vessel pending an appeal to the Circuit Court was illegal, in violation of the express directions of the statute regulating appeals.

We do not understand the law to be that an actual and continuous possession of the *res* is required to sustain the jurisdiction of the court. When the vessel was seized by the order of the court and brought within its control the jurisdiction was complete. A subsequent improper removal cannot defeat such jurisdiction. The present claimants are not *bonâ fide* purchasers, setting up new interests. They are purchasers only of such interest as passed under the claims of Mrs. Price and Mr. Williams. This was the very title set up, litigated, and decided in the Alabama suit. It cannot again be interposed and litigated a second time, as a defence to that decree.

In *Cooper* v. *Reynolds*,* the court say: "Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may

* 10 Wallace, 317.

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make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular case depends upon the nature and extent of the authority vested in it by law in regard to the subject-matter of the cause."

In the case of *The Brig Ann*,* Chief Justice Marshall says: "In order to constitute and perfect proceedings *in rem* it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession when it is submitted to the process of the court; it is constructively so when by a seizure it is held to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree *in rem*. . . . Before judicial cognizance can attach upon a forfeiture *in rem* under the statute there must be a seizure, for until seizure it is impossible to ascertain what is the competent forum. And if so, it must be a good subsisting seizure at the time when the libel or information is filed or allowed. If a seizure be completely and explicitly abandoned and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. It is not meant to assert that a tortious ouster of possession, a fraudulent rescue or relinquishment of her seizure will divest jurisdiction. The case put is that of a voluntary abandonment and release of the property seized, the legal effect of which must be, we think, to purge away all the prior rights acquired by the seizure."

In *Taylor* v. *Carryl*,† the rule is thus laid down: "In admiralty all parties who have an interest in the subject of the suit, *the res*, may appear, and each may propound independently his interest. The seizure of the *res* and the publication of the monition or invitation to appear is regarded as equivalent to the particular service of process in law and equity. But the *res* is in no other sense than this the representative of the whole world. But it follows that to give jurisdiction *in rem* there must have been a valid seizure and an actual control of the ship by the marshal of the court:

* 9 Cranch, 290–1.

† 20 Howard, 599.

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and the authorities are to this effect.* In the present instance the service was typical. There was no exclusive custody or control of the bark by the marshal from the 21st day of January, 1848, to the day of sale, and when the order of sale was made in the District Court she was in the actual and legal custody of the sheriff."

We hold the rule to be that a valid seizure and actual control of the *res* by the marshal gives jurisdiction of the subject-matter, and that an accidental or fraudulent or improper removal of it from his custody, or a delivery to the party upon security, does not destroy jurisdiction.† In the present case the order for restoration was in direct violation of the statute regarding appeals, and did not operate to destroy the jurisdiction of the Circuit Court. That court was authorized to proceed as if no such order had been made.

It is further insisted by the appellants that the Circuit Court in Alabama had no authority to render its decree, for the reason that the subject-matter, to wit, materials and repairs to a vessel in a domestic port, gives no ground of jurisdiction. There are several answers to this suggestion:

1. We do not know that the facts are as alleged in the objection. Supplies were furnished and repairs were made, but whether the vessel was an American or a foreign vessel we have no means of determining. The report of the master makes reference to various matters which would authorize a determination either way, but the testimony itself is not given. Until a short time before the furnishing the materials the vessel had been a Mexican vessel, and the claimant had repeatedly stated that she was a foreign vessel, but how the fact was we have no legal means of determining.

2. Whether the vessel was foreign or domestic was one of the questions presented to the Circuit Court and passed upon by it, and conclusively.‡

3. If there was error in the decision on this point it was

* Jennings v. Carson, 4 Cranch, 2; 2 Ware's Admiralty, 362.

† Jennings v. Carson, 4 Cranch, 28.

‡ Hudson v. Guestier, 6 Cranch, 284.

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error only, and not an excess of jurisdiction. The vessel was in possession of the court when the suit was commenced. It was the duty of the court to decide whether the proceeding should be *in rem* or *in personam*, and until reversed its decree on this question is conclusive.

The judgment and decree of the Circuit Court in Alabama, that the vessel was subject to the lien of the libellants' claim, remaining in full force, was conclusive of the right of such claim when alleged in the District of Louisiana. The judgment of the Circuit Court to that effect was right, and must be

AFFIRMED.

LEWIS v. COCKS.

1. A bill in equity is not the proper means to recover possession of land, there being no fraud in the case, nor other matter specially the subject of equitable cognizance, and a party cannot by any colorable suggestion of fraud, account, &c., use such a bill in place of the common-law remedy of ejectment. The court will look at the proofs, and if there be no proof at all of the matters which would make a proper case for equity it will disregard them, and look at the bill simply in its aspect of one to recover land of which the complainant is out of possession.
2. If the bill be clearly one of the sort above spoken of it is the duty of the court *sua sponte*, and though there be no demurrer, plea, or answer setting it up, to recognize the fact and give to it effect.

APPEAL from the Circuit Court for Louisiana.

In March, 1863, Anderson, alleging himself to be a creditor to the extent of $8840 of one Cocks, filed a petition in the "Provisional Court of New Orleans"—a court established by proclamation of President Lincoln during the rebellion (while New Orleans was occupied by the troops of the United States), and of which a full account is given in preceding cases*—that Cocks, then absent from the State,

* The Grapeshot, 9 Wallace, 129; Handlin v. Wickliffe, 12 Id. 178; Pennewet v. Eaton, 15 Id. 382; Mechanics', &c., Bank v. Union Bank, 21 Id. 278.

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and a certain Hyllested, who the petition alleged was the proper agent of Cocks in the matter of a proceeding like the one embraced by the petition, might be cited to appear, and after proceedings had, be condemned to pay the amount for which Anderson, as already said, alleged himself to be a creditor.

The Provisional Court gave judgment by default for Anderson, and execution having issued, two houses and lots, the property of Cocks, were sold to a certain Izard, to whom possession, which he still had, was delivered by the marshal of the court.

Hereupon—Anderson having died and administration having been granted on his estate—the rebellion also being ended and the regular courts of the United States re-established—Cocks filed, A.D. 1866, a bill in equity in the court below against Izard, praying that the defendant might be decreed to execute in favor of the complainant a deed for the property on receiving the price paid by the defendant for the same.

The relief was prayed for on the grounds—

1. That the Provisional Court was a nullity and its judgment against Cocks void.

2. That no service of process had been made upon Cocks; that no sufficient service had been made upon Hyllested, the agent of Cocks, and that Hyllested was not such an agent as that valid service *could* be made upon him.

3. That Izard was guilty of a gross fraud touching the sale of the property by the marshal; that he professed to be the friend of Cocks, and to intend to buy in the property for him; that he thus deterred others from bidding and himself bought the property at a sacrifice; that subsequently he acknowledged to Cocks his fiduciary relation to the property, and expressed a willingness to surrender it, but that finally his cupidity got the better of his integrity, and impelled him to deny that Cocks had any right whatever to the property, and that he now claimed it as his own.

The bill tendered back the purchase-money paid to Izard with interest.

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Argument in support of a jurisdiction in equity.

Izard answered and denied all the material allegations of the bill. He also set up that he had mortgaged the property to Lewis; that it had been seized and sold under that mortgage; that Lewis became the purchaser, and that his, Izard's, entire title had thus become divested out of him and vested in Lewis.

Lewis also answered, setting up the same facts as to his title as had been stated by Cocks, and making the same denials as to the averments of the bill. He was accordingly substituted as defendant.

On the hearing, the great weight of evidence appeared to show that the fraud alleged against Izard had not been committed by him.

The Circuit Court, however, decreed in favor of the complainant, and Lewis took this appeal.

Mr. P. Phillips, for the appellant, after observing that the question as to the constitutionality of the Provisional Court was not longer open, contended that the case was nothing more in fact than a claim by a man out of possession (the complainant) for real estate of which another man (the defendant) was in possession; that to establish such a claim ejectment (which this proceeding was not) was the proper remedy, and a bill in equity (which this proceeding was) an improper one. That even if proper service had been made the bill was demurrable, and that therefore the question of service was of no importance. It might be admitted to have been well made, still the bill should have been dismissed.

Mr. Conway Robinson, contra, submitted that if fraud were disproved, a question of account growing out of the matter of purchase-money was still involved—in addition to the demand for the land—making equitable relief the most convenient and complete relief; that, at all events, the objection not having been profited of by demurrer or other proper pleading, could not now be taken advantage of. He also went into a quotation and examination of the Code of Louisiana to show the insufficiency of the service.

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Opinion of the court.

Mr. Justice SWAYNE delivered the opinion of the court.

The question of the validity of the Provisional Court is not an open one. We have held it valid upon more than one occasion when the question has been before us.*

The fraud charged upon Izard is expressly denied by his answer and is not sustained by the evidence. There is a decided preponderance against it. We are unanimous upon the point. It could serve no useful purpose to examine the proofs in detail in order to vindicate our judgment. Nothing further need be said upon the subject.

The remaining part of the case is that which relates to the allegations of the non-service of process.

In considering the bill, we must regard it as being just as it would be if it contained nothing but what relates to this subject. Everything else must be laid out of view. It must be borne in mind that the complainant is not in possession of the property.

If the bill alleged only the nullity of the judgment, under which the premises were sold, by reason of the non-service of the original process in the suit, wherefore the defendant had no day in court, and judgment was rendered against him by default, and upon those grounds had asked a court of equity to pronounce the sale void, and to take the possession of the property from Izard and give it to the complainant, could such a bill be sustained? Such is the case in hand. There is nothing further left of it, and there is nothing else before us. Viewed in this light, it seems to us to be an action of ejectment in the form of a bill in chancery. According to the bill, excluding what relates to the alleged fraud, there is a plain and adequate remedy at law, and the case is one peculiarly of the character where, for that reason, a court of equity will not interpose. This principle in the English equity jurisprudence is as old as the earliest period in its recorded history.†

* The Grapeshot, 9 Wallace, 129.

† Spence's Jurisdiction of Courts of Chancery, 408, note b; Id. 420, note a.

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Opinion of the court.

The sixteenth section of the Judiciary Act of 1789,* enacting "that suits in equity shall not be sustained in either of the courts of the United States in any case where plain, adequate, and complete remedy may be had at law," is merely declaratory and made no change in the pre-existing law.

To bar equitable relief the legal remedy must be equally effectual with the equitable remedy, as to all the rights of the complainant. Where the remedy at law is not "as practical and efficient to the ends of justice and its prompt administration," the aid of equity may be invoked, but if, on the other hand, "it is plain, adequate, and complete" it must be pursued.†

In the present case the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel, nevertheless if it clearly exists it is the duty of the court *sua sponte* to recognize it and give it effect.‡

It is the universal practice of courts of equity to dismiss the bill if it be grounded upon a merely legal title. In such case the adverse party has a constitutional right to a trial by jury.§

Where the complainant had recovered a judgment at law and execution had issued and been levied upon personal property, and the claimant, under a deed of trust, had replevied the property from the hands of the marshal, and the judgment creditor filed his bill praying that the property might be sold for the satisfaction of his judgment, this court held that there was a plain remedy at law; that the marshal might have sued in trespass, or have applied to the Circuit Court for an attachment, and that the bill must therefore be dismissed.‖

In the present case the bill seeks to enforce "a merely legal title." An action of ejectment is an adequate remedy.

* 1 Stat. at Large, 82. † Boyce v. Grundy, 3 Peters, 215.

‡ Hipp et al. v. Babin et al., 19 Howard, 278; Baker v. Biddle, Baldwin, 416.

§ Hipp et al v. Babin et al., 19 Howard, 278

‖ Knox et al. v. Smith et al., 4 Howard, 298.

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Syllabus.

The questions touching the service of the process can be better tried at law than in equity. If it be desired to have any rulings of the court below brought to this court for review, they can be better presented by bills of exception and a writ of error than by depositions and other testimony and an appeal in equity.

There is another important point, which we have not overlooked. It is whether the judgment of the Provisional Court can be pronounced a nullity without the legal representative of Anderson, the deceased plaintiff, being before the court as a party. As the first objection is a fatal one we have not considered that question.

DECREE REVERSED, and the case remanded with directions TO DISMISS THE BILL.

GRAND TOWER COMPANY v. PHILLIPS ET AL.

A company having coal-mines at a place on the Mississippi, eighty miles above Cairo, agreed to deliver 150,000 tons of coal, the product of its mines, to P. & S., at $3 a ton during the year 1870, in equal daily proportions between the 15th of February and the 15th of December; that is to say, 15,000 tons each month. There was no other market at the place for the purchase of coal but that of the company itself. The contract contained a clause thus:

"If through no fault of the parties of the second part (P. & S.), the party of the first part (the company) shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay to the parties of the second part, as liquidated damages, twenty-five cents for each and every ton which it may have so failed to deliver; OR instead thereof the parties of the second part may *elect to receive all or any part of the coal so in default in the next succeeding month, in which case the quota which the party of the first part would otherwise have been bound to deliver under this contract, shall be increased in such succeeding month to the extent of the quantity in default.*"

Coal rose greatly in value, that is to say, rose from about $3 a ton to $9; and without fault of P. & S, the company did fail to deliver the quota (15,000 tons) due in October; and P. & S. thereupon elected and gave notice of the election to take the said quota in November. But the company failed to deliver it then, and failed also to deliver the quota (15,000 tons) due in November. P. & S. then elected and gave notice

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of their election to take in December the quota due in November, as also that due in October. No coal, however, was delivered at any time.

On suit by P. & S. against the company, for breach of contract, *Held*,

1st. That notwithstanding the clause in the contract about "liquidated damages," P. & S. were entitled to the actual damages sustained by them.

2d. That the measure of such damages (in view of the fact that there was no market for the purchase of coal at the place of delivery but that of the company itself) was the price which P. & S. would have had to pay for coal of the sort in the quantities in which they were entitled to receive it from the company under the contract, at the nearest available market where it could have been obtained.

3d. That the cash value of similar coal, at Cairo, or at points below it on the Mississippi River, after deducting the contract price of it, and the cost and expenses of transporting it thither, was not a true measure of value, and that it was error to allow such value to be shown to the jury, so long as any more direct method was within reach.

4th. That letters passing between the president of the company and the local agent at the place where the coal was delivered, containing private instructions to such agent, were erroneously allowed to be read to fix the measure of damages; the reasons and motives which the company or its officers had in not furnishing coal to the plaintiffs not having been in issue.

ERROR to the Circuit Court for the Southern District of Illinois; in which court Phillips & St. John, partners, sued the Grand Tower Company—a mining, manufacturing, and transportation corporation of Illinois—to recover damages for breach of contract.

The declaration set forth that the company, on the 15th of December, 1869, entered into a written contract with the plaintiffs to deliver to them at the company's coal-dump, at Grand Tower, in Jackson County, Illinois, on the Mississippi River, and about eighty miles above Cairo, on board vessels to be provided by the plaintiffs, 150,000 tons of lump and nut coal of the company's mines in the said county, during each of the years 1870, 1871, and 1872, in equal daily proportions, as near as might be, between the 15th of February and the 15th of December in each of said years. The company also leased certain boats to the plaintiffs. The Grand Tower Company had control of all the coal at Grand Tower; and there was no market there for the purchase of coal but that of the company. It was provided by the agree-

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ment that Phillips & St. John should have the sale of all coal produced by the said mines which should be sold at and below Cairo, and that they should not sell any coal north of Cairo. The price to be paid for the coal for the first year was $3 per ton for lump, and $1.50 for nut. The price for the other years was to be graduated by the proportionate expense of mining. Phillips & St. John agreed, if not prevented by ice or low water, to furnish barges or suitable vessels sufficient to receive the said coal in equal daily proportions, which barges and vessels the company agreed to load without unnecessary delay. It was provided by the ninth article of the agreement as follows, that is to say:

"It is further mutually agreed, that if for any other than the unavoidable causes hereinbefore mentioned, and through no fault of the said Phillips & St. John, the parties of the second part, the said Grand Tower Company, party of the first part, shall fail in any one month to deliver all or any part of the quota of coal to which the parties of the second part may be entitled in such month, the party of the first part shall pay to the parties of the second part, *as liquidated damages, twenty-five cents for each and every ton which it may have so failed to deliver;* or *instead thereof*, the parties of the second part may elect to receive all or any part of the coal so in default in the next succeeding month, *in which case the quota which the party of the first part would otherwise have been bound to deliver under this contract, shall be increased in such succeeding month to the extent of the quantity in default.*"

It was on the part of this article above italicized that the controversy between the parties principally turned.

The declaration alleged that the company, without any of the grounds of excuse stated in the agreement, failed to deliver the monthly quota of coal due in October, 1870, although the plaintiffs had barges ready to receive it; and that the plaintiffs thereupon elected to take said quota for said month, amounting to 15,000 tons, in the next succeeding month, and gave notice to the defendant accordingly; but that the defendant also, without any excuse, failed to deliver the said quota in November, 1870, or the quota due for the said month of November, or any part thereof, amounting in

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all to 30,000 tons which they thus failed to deliver, and that the defendant had never delivered the same. Damages were assigned for loss of profits (the price of coal below Cairo that autumn being, as alleged, $9 per ton), and for the expense of keeping their barges and towboats ready to receive coal at Grand Tower.

Other counts were afterwards added, alleging a like election by the plaintiffs to take the quota for November during the following month of December, and the quotas for both October and November during the said month of December, and a failure to furnish the said quotas, amounting in all to 30,000 tons, with breaches as before.

Various pleas having been put in, the issues were whether the plaintiffs had failed to furnish barges to receive the quotas of coal due in October and November, and if so what damages the plaintiffs sustained by the failure of the defendant to furnish the coal; the question of damages being really the principal question in the cause, no failure to furnish the barges having been shown, but the contrary.

The defendant insisted that by the agreement the damages were liquidated at twenty-five cents per ton for all the coal which it failed to deliver in accordance with the agreement.

The plaintiffs, on the contrary, contended that they had the option either to take the liquidated damages accruing on each month's deficiency, or to insist on having the coal itself delivered to them in the following month; and that when such election was made the refusal by the defendant to deliver the coal entitled the plaintiffs to the actual damage which they sustained by its non-delivery.

The defendant conceded that the plaintiffs had the option referred to, but insisted that the plaintiffs, by electing to receive the deficient coal in the following months, merely postponed the time of its delivery, and increased the quota of the said following month, which thereupon became subject, if not furnished, to the same rule of liquidated damages as before. If twenty-five cents per ton was all that the defendant was liable for, the damages would have amounted to only $7500, for the quotas of October and November. If

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the exercise by the plaintiffs of their option to have the coal itself entitled them to the actual damage which they sustained by its non-delivery, it is evident, on comparing the price which they were to give for the coal ($3) with that ($9) which coal brought during the autumn of 1870, that their damages might be much more than the sum mentioned.

The court took the plaintiffs' view of the subject, and decided that the plaintiffs were entitled to the actual damages sustained by them by the non-delivery of the quotas of coal for October and November.

The next inquiry, therefore, was as to the rule by which those damages were to be ascertained. On this point the plaintiffs offered evidence to show the prices of coal during November and December, 1870, at all points on the Mississippi River, *below Cairo even to New Orleans.*

The defendants objected to this, insisting that the price at *Grand Tower* was the measure of damages if the twenty-five cents per ton were departed from.

The plaintiffs argued that this was a measure impossible to be applied, the Grand Tower Company having a monopoly of the market at Grand Tower, and there being no mines there but the company's own, the company thus making the only market there then was, and refusing to sell.

The court received the evidence offered.

The plaintiffs also offered and were allowed to introduce and read in evidence to the jury several letters from the President of the Grand Tower Company, Mr. G. T. Oliphant, to the company's local agent, one Driggs, at Grand Tower, the existence of which in his hands his testimony disclosed. The following letters give an idea of the class:

[OLIPHANT TO DRIGGS.]

"NEWPORT, September 10th, 1870.

"MY DEAR SIR: I feel more than ever anxious to put an end to the contract with Phillips & St. John. One difficulty in the way is that they have possession of our river fleet. This, however, I suppose we could reach by a writ of replevin at any time when the vessels are within our grasp.

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"The other obstacle is in the fact that they will undoubtedly sue us for damages, if we decline to deliver them the coal. This makes it important that we should, if possible, place them in the wrong before we take the decisive step. But we cannot afford to wait long, as they could hardly recover enough, in any event, to hurt us as much as we could be hurt by the waste of our river fleet and the embarrassment to our business which their action necessarily involves.

"If they beat us, what damage could they show? The measure of damages would be only the difference between the contract price of our coal and what they might have to pay for other coal of equal quality.

"I have written to Col. Allen on these points, and I wish you would consult him fully and carefully. If I am right, I would take prompt measures to get hold of our river property in their possession; then notify them of our purpose not to deliver any more coal to them. Having this in view, I would hold on to any barges loaded for them this month without coming to an actual rupture, and I would press the settlement of our joint account with them, allowing them, under protest, of course, in order to effect such settlement, more than you believe them entitled to. In other words, get all the money you can first, then get the river stock, and when that is accomplished, throw them overboard, and let them sue.

"Yours, truly,

"G. T. OLIPHANT.

"H. R. DRIGGS."

[SAME TO SAME.]

"NEWPORT, September 1st, 1870.

"MY DEAR SIR: We must put up the price of coal to transient customers at Grand Tower to $4\frac{1}{2}$ per ton for lump and $2.80 for nut.

"Hurry up a settlement of some sort with Phillips & St. John, and deliver them no more coal without my orders. I want to get all I can out of them before the rupture.

"Yours,

"G. T. OLIPHANT.

"H. R. DRIGGS."

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Opinion of the court.—Actual damages given.

[SAME TO SAME.]

"NEWPORT, September 30th, 1870.

"MY DEAR SIR: I have yours of the 9th instant. I note what you say about the advance of prices on the river, which I suggested. I hope to be at Grand Tower this month. Phillips & St. John's account you may leave, though I see little to be gained by delay. Contract or no contract, they will get no more coal from us. The court may award damages, but Phillips & St. John will have to encounter a large expense of time and trouble before they get them, and we had better pay the full amount every month rather than go on as at present.

"Yours, truly,

"G. T. OLIPHANT.

"H. R. DRIGGS."

The counsel for the company objected to the introduction of these letters, because they contained nothing addressed to Phillips & St. John, and did not tend to prove or disprove the issue on trial, and were irrelevant and improper. But the court admitted them.

The evidence being closed, the court charged the jury that the true measure of damages was the cash value during those months of the kind of coal mentioned at Cairo, *or points below it on the Mississippi River*, after deducting the contract price of the coal and the cost and expenses of transporting it thither.

To this charge the defendant excepted.

The jury found damages to the amount of $200,000 (nearly $7 per ton for the alleged deficit of 30,000 tons), and judgment having been given accordingly the defendant brought the case here.

Messrs. T. G. Allen and W. M. Evarts, for the company, plaintiff in error; Mr. H. S. Green, contra.

Mr. Justice BRADLEY delivered the opinion of the court.

The court below was of the opinion that the plaintiffs were entitled to the actual damages sustained by them, by the non-delivery of the quotas of coal for October and November, 1870.

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The question whether this view was right or not depends upon the true construction of the agreement made by the parties, and we are of opinion that the view taken by the court below on this point was correct. It is evident, from an inspection of the contract, that the election given to the plaintiffs to receive in the following month the coal which they were entitled to receive and did not receive in a particular month, was a substitute for the liquidated damages of twenty-five cents per ton. With regard to that particular amount of coal the rule of liquidated damages was at an end. The agreement did not carry it forward to the following month. It imposed upon the defendant the obligation, if the plaintiffs so elected, to furnish the coal itself instead of paying the liquidated sum. If not so, what was the option worth? It amounted to nothing more than the right of giving to the defendant another month to furnish the coal. Surely they would have had that right without stipulating for it in this solemn way. Had not this option been given to the plaintiffs the defendant would have had the option either to furnish the coal or to pay the twenty-five cents per ton for not furnishing it—a sum which they could very well afford to pay upon a slight rise in the market prices. It was evidently the very purpose of the option given to the plaintiffs to avoid this oppressive result. They could require the coal to be furnished at all events, and, if they elected to do this, it was the duty of the defendant to furnish it. The contrary construction would make the stipulation worse than useless. The plaintiffs might continue to exercise their election to receive the coal, month after month, without avail, and, at the end, find themselves exactly at the point they started from—forced to accept the twenty-five cents per ton.

The law affords many analogies in accordance with the views we have taken. Thus, by the common law, a gift of property to several in common, and when either of them dies a gift of his share to the survivors, does not subject that share to further survivorship unless it is so expressly provided. So, a condition not to underlet without license does

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not extend to a sub-tenant. Instances of this kind might be multiplied at will.

But whilst we concur with the court below on this point, which is the most important point in the cause, there are certain assignments of error which seem to be well taken and will require a reversal of the judgment. These relate to the admission of evidence which may have affected, and probably did seriously affect, the amount of the verdict.

In regard to the measure of damages, the plaintiffs were allowed to show the prices of coal during November and December, 1870, at all points on the Mississippi below Cairo even to New Orleans. And the court charged the jury against the exceptions of the defendant, that the true measure of damages was the cash value during those months of the kind of coal mentioned in the contract, at Cairo, or points below it on the Mississippi River, after deducting the contract price of the coal and the cost and expense of transporting it thither, and making due allowance for the risk and hazard of such transportation. Now although it is probable that the plaintiffs could have got the prices which the evidence showed were obtained for coal at and below Cairo, had their coal been furnished according to the agreement, yet the rule of law does not allow so wide a range of inquiry, but regards the price at the place of delivery as the normal standard by which to estimate the damage for non-delivery. It is alleged by the plaintiffs that this rule would have been a futile one in their case, because no market for the purchase of coal existed at Grand Tower, except that of the defendant itself, which, by the very hypothesis of the action, refused to deliver coal to the plaintiffs, and which had the whole subject in its own control. This is certainly a very forcible answer to the proposition to make the price of coal at Grand Tower the only criterion. It is apparent that the plaintiffs would be obliged to resort to some other source of supply in order to obtain the coal which the defendant ought to have furnished them. And it would not be fair, under the circumstances of the case, to confine them

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to the prices at which the defendant chose to sell the coal to other persons. The true rule would seem to be, to allow the plaintiffs to show the price they would have had to pay for coal in the quantities which they were entitled to receive it under the contract, at the nearest available market where it could have been obtained. The difference between such price and the price stipulated for by their contract, with the addition of the increased expense of transportation and hauling (if any), would be the true measure of damages. To this is properly to be added the claim (if any) for keeping boats and barges ready at Grand Tower for the receipt of coal.

But the prices of coal at New Orleans, at Natchez, and other places of distribution and sale, although they might afford a basis for estimating the profits which the plaintiffs might have made had the coal stipulated for been delivered to them, cannot be adopted as a guide to the actual damage sustained so long as any more direct method is within reach.

Another point in which the court erred in the course of the trial, was in the admission of the letters of Oliphant, the president of the Grand Tower Company, containing his private instructions to and correspondence with the local agent at Grand Tower. This evidence was clearly inadmissible under the issue, and should have been excluded. The particular reasons or motives which the company or its officers may have had in not furnishing coal to the plaintiffs were not in issue.

JUDGMENT REVERSED, and

A VENIRE DE NOVO AWARDED.

HEPBURN v. THE SCHOOL DIRECTORS.

1. Under the act of Congress of February 10th, 1868, enacting that the legislature of each State may direct the manner of taxing all the shares of National banks located within said State, subject to the restriction that "the taxation shall not be at a greater rate than is assessed *upon other moneyed capital* in the hands of individual citizens of such State," and the act of the legislature of Pennsylvania of March 31st, 1870, en-

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acting that the shares of National banks within that State "shall be taxable for county, school, municipal, and local purposes, at the same rate as now is or may hereafter be assessed and imposed upon other moneyed capital in the hands of individual citizens of the State"—shares in National banks may be valued for taxation for county, school, municipal, and local purposes, at an amount above their par value.

2. This is true of shares in a National bank in Cumberland County, Pennsylvania, although by statute of Pennsylvania, "all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate," are made exempt from taxation in that county, except for State purposes.

ERROR to the Supreme Court of Pennsylvania. The case was thus:

An act of Congress of February 10th, 1868, relating to the taxation by States of shares in the National banks, thus enacts:*

"The legislature of each State may determine and direct the manner and place of taxing all the shares of National banks located within said State, *subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.*"

An act of Assembly of Pennsylvania, of March 31st, 1870, with a view of giving effect to this act of Congress, further enacts:†

"All the shares of National banks, located within this State, shall be taxable for State purposes at the rate of three mills per annum, upon the assessed value thereof, *and for county, school, municipal, and local purposes, at the same rate as now is or may hereafter be assessed and imposed upon other moneyed capital in the hands of individual citizens of this State.*"

This act gives an appeal to the Auditor-General, who is authorized by the act to correct any errors in the assessment.

Another act of Assembly of Pennsylvania, one of April 4th, 1868,‡ enacts that Cumberland County, in which county the town of Carlisle is situated, enacts additionally:

* 15 Stat. at Large, 84.

† Pamphlet Laws. 1870, p. 42.

‡ Ib. 1868, p. 61.

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Argument for the stockholder.

"All mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate, shall be exempt from taxation except for State purposes," &c.

In this state of legislation, Federal and State, Hepburn, a citizen of Pennsylvania, residing at the borough of Carlisle, in Cumberland County, in the said State, owned four hundred and sixty shares of stock in the First National Bank of Carlisle, the par value of which was $100 a share.

This stock was assessed for county, school, and borough tax by the bank assessor, appointed under an act of Assembly of Pennsylvania, approved April 12th, 1870 at the value of $150 per share.

On amicable suit brought by the school directors to test their right to collect the school tax, the Supreme Court of Pennsylvania adjudged that they had such a right; and, to reverse that judgment, Hepburn brought this writ of error.

Mr. Joseph Casey, for the plaintiff in error:

1. There does not seem to be room for doubt that "moneyed capital in the hands of individual citizens"—the term used in the act of Congress of 1868 and in the act of Pennsylvania of 1870—means private investments other than in stocks or securities. It refers doubtless to loans upon bond and mortgage; loans upon collaterals whether real or personal, and to other loans made in the various modes in which individuals invest their capital upon interest other than in corporation stocks and public securities.

But by the act of Pennsylvania of April 4th, 1868, this "other moneyed capital in the hands of individuals" residing in Cumberland County (in which is the borough of Carlisle), where this bank whose shares are taxed is located and where Hepburn resides, was not subject to taxation for school purposes. Does not, then, this National bank stock come directly within the express restriction of the act of Congress of February 10th, 1868? Did not the taxation made in this case unfairly and unjustly discriminate against it?

2. But if we are mistaken in this, we say next that the

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assessment should have valued the stock at its par value, and not at a value above it.

The tax assessed upon "other moneyed capital in the hands of individuals" by the State of Pennsylvania is upon the par or nominal value of such capital. If money be at interest on bond or mortgage, at three, four, five, or six per cent. interest per annum, the tax of three mills on the dollar is the same in each case.

Yet the securities would have quite different market values. *Cæteris paribus*, the first three would be below par, the last at or perhaps above it. So, too, when the rate of interest is full, it is the same, too, whether the security be a first mortgage of the highest class—such as would sell in the market above par—or a second mortgage of inferior grade, which could not be sold but at a large discount. There is, in short, no provision in the laws of the State for any assessment of the market value of such securities. They are taken at the value indicated on their face and taxed accordingly.

In valuing these shares at fifty per cent. above par the tax is made fifty per cent. greater than on "other moneyed capital in the hands of individuals."*

Messrs. J. M. Carlisle and J. D. McPherson, contra.

The CHIEF JUSTICE delivered the opinion of the court.

The most important question presented by the assignment of errors is, whether shares of stock in a National bank can be valued for taxation by the State in which the bank is located, at an amount exceeding their par value. It is certain that they cannot be taxed at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State. Such is the express provision of the act of Congress.

It is contended that the term "moneyed capital," as here

* People v. The Commissioners, 4 Wallace, 244; Bradley v. The People, Ib. 459; Opinion of Miller, National Bank v. Commonwealth, 9 Id. 360.

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used, signifies money put out at interest, and that as such capital is not taxed upon more than its par or nominal value, the par value of these shares is their maximum taxable value.

We cannot concede that money at interest is the only moneyed capital included in that term as here used by Congress. The words are "other moneyed capital." That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term.

But even if it were true that these shares can only be taxed as money at interest is, the result contended for would not necessarily follow. The money invested in a bank is not money put out at interest. The money of the bank is so put out and the share of the shareholder represents his proportion of that money. What the amount of this share is, must, in some form, be ascertained in order to determine its taxable value. If the nominal or par value of the stock necessarily indicated this amount, there might be some propriety in making that the taxable value; but, as all know, such is not the case. The available moneyed capital belonging to a bank may be diminished by losses or increased by accumulated profits. Therefore some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock. The State of Pennsylvania has provided that this may be done by an official appraisement, taking care to prevent abuses by declaring that such appraisement shall not be higher than the current market value of the stock at the place where the bank is located, and by giving an appeal to the Auditor-General, who is authorized to inquire into the value and correct any errors that may appear. There certainly is no apparent injustice in this. It is not the amount of money invested which is wanted for taxation, but the amount of moneyed capital which the investment represents for the time being.

If the value set upon the share does not exceed this amount it will not be assessed at a greater rate than other money at interest. Other plans may be devised to accom-

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plish the same end, but it is sufficient for the purposes of this case that this plan is not unreasonable. If a shareholder is not satisfied with the original appraisement, all he has to do is to appeal to the Auditor-General, make known to him the actual condition of the affairs of the bank, and have the error if any exists corrected. Hepburn did not see fit to avail himself of this right which he had. He preferred to rest upon his supposed right, under the act of Congress, to limit the power of assessment to the par value. This right, we think, he did not have.

It is next insisted that no municipal or school taxes could be assessed upon the shares of the First National Bank of Carlisle, a National bank located within the borough of Carlisle, because by the laws of Pennsylvania, as is claimed, other moneyed capital in the hands of individual citizens at that place is exempt from such taxation.

In support of this claim it is shown that all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation in that borough except for State purposes. This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. Necessarily there may be other moneyed capital in the locality than such as is exempt. If there is, moneyed capital, as such, is not exempt. Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt. Certainly there is no presumption in favor of such an intention. To have effect it must be manifest. The affirmative of the proposition rests upon him who asserts it. In this case it has not been made to appear.

JUDGMENT AFFIRMED.

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GREEN v. GREEN.

Where a husband and wife conveyed lands in trust for the sole and separate use of the wife and for the children of the two parties, during the wife's life in absolute property, as if she were a *feme sole*, and free and clear of "any right, title, and estate, whether as tenants by the curtesy or otherwise, of her present or any future husband, and from his control and from any liability for his debts, and upon trust and to hold and dispose of and convey the said premises in such manner and to such uses, interest, and purposes as the wife may from time to time direct, by any last will and testament, or other testamentary writing, of what form soever, which she, the wife, notwithstanding her present or any future coverture, shall and may direct, limit, and appoint; and in the absence of any such direction, limitation, or appointment, or subject thereto, or remainder after her death, to her heirs at-law of the wife"—the rule in Shelley's case does not apply. A fee simple is not created in the wife; and a *deed* by her, her husband and her trustee conveying or pledging the property, is void and may be set aside by herself and her children. She could pass title only by a testamentary writing of some form.

APPEAL from the Supreme Court of the District of Columbia. The case was thus:

Thomas Green, by deed dated January 15th, 1867, conveyed certain real estate in Georgetown, D. C., to James Green, in fee in trust. The trust was in these words:

"For the sole and separate use of Catharine Green (wife of the said Thomas) and for the children of said Thomas Greer and Catharine Green, during her life, in absolute right and property, as if she was a *feme sole*, and free and clear of any right, title, and estate, whether as tenants by the curtesy or otherwise, of her present or any future husband, and from his control and from any liability for his debts, and upon trust and to hold and dispose of and convey the said premises in such manner and to such uses, interest, and purposes as she, the said Catharine Green, may from time to time direct, *by any last will and testament, or other testamentary writing, of what form soever*, which she, the said Catharine Green, notwithstanding her present or any future coverture, shall and may direct, limit, and appoint; and in the absence of any such direction, limitation, or appointment, or subject thereto, or remainder after her death, to her heirs-at-law of the said Catharine Green."

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Statement of the case.

On the 21st of November, 1868, James Green, as trustee, and Thomas Green and Catharine Green united in a deed to one Ward, whereby they conveyed to him in fee simple the premises described in the deed first set forth, in trust to secure the payment of a note for $6000, payable six months from date, with interest, and bearing even date with the deed, payable to the order of Lewis Wells. At this time Mr. and Mrs. Thomas Green had two daughters, both under age.

This note having matured, and continuing unpaid, Ward, at the request of Wells, advertised the premises for sale, and was proceeding to a sale thereof under the power contained in the deed to Ward.

Hereupon Mrs. Green, and the two infant daughters by their guardian, filed a bill in the court below—the bill in this case—against the trustee, the husband, and Ward, alleging that the deed to Ward was improvidently executed; that Mrs. Green had no power to appoint or limit the fee simple of the premises therein described by deed, but only by a last will and testament, or a testamentary writing; that the deed to Ward was accordingly void; that the powers contained in it were unauthorized by the deed of trust to James Green for their benefit; that the title obtained under the deed to Ward would impair the equitable title of the said Mrs. Green and of her children under the deed for her and their benefit, and asking that the deed to Ward might be set aside, and an injunction issue restraining Ward from selling under the alleged authority of the deed to him.

The trustee and the husband answered, admitting the facts as alleged.

Ward answered denying that the deed was void. His position was that under the rule in Shelley's case, the wife became, by the conveyance in trust to James Green, the owner of the property in fee simple; that the estate granted to her for life, and the remainder to her heirs-at-law, being both equitable estates, united in her as an estate of inheritance, and without reference to the exercise of the power of appointment; that, being the owner of the fee, her deed to Ward carried the full title to him.

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Opinion of the court.

The court below decreed a perpetual injunction, and that the defendant, Ward, be absolutely enjoined and prohibited from selling, or attempting to sell, the property described in the trust deed, except the life interest of Mrs. Green in one-third thereof, and that the defendants below pay the costs of suit.

From this decree the defendants appealed to this court.

Messrs. L. S. Wells and W. B. Webb, for the plaintiff in error; Mr. W. S. Cox, contra.

Mr. Justice HUNT delivered the opinion of the court.

In Shelley's case,* the rule is thus laid down: "that when the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited either mediately or immediately to his heirs in fee or in tail, the heirs are words of limitation of the estate and not words of purchase."

Mr. Preston uses the following language, which is approved by Chancellor Kent:† "When a person takes an estate of freehold legally or equitably under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs, or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate."

The trust deed of Thomas Green of January 15th, 1867, creates the following trusts, to which the premises are subjected:

1. To the use of Catharine Green and the children of Thomas Green and herself during the life of Catharine Green. There are two such children. Catharine and her two children are, therefore, joint tenants, or tenants in common of the estate during the life of Catharine. The words,

* 1 Reports, 219.

† 1 Preston on Estates, p. 268; 4 Kent's Commentaries, 215.

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"as if she were *feme sole*," "free and clear of any right or control of her present or future husband," do not define the estate, but have the effect simply to exclude any possible claim on the part of her husband or his creditors.

2. To such uses and purposes as the said Catharine may, by testamentary writing, limit and appoint.

3. In the absence of such limitation, or subject thereto, or remainder after her death, to the heirs-at-law of the said Catharine.

It is contended that these trusts create an estate in fee simple in Catharine Green, which, by her deed to Mr. Ward, has become vested in him.

The rule in Shelley's case is applicable to trust estates where both the life estate and the remainder are of the same character. The legal effect of the union of the estates, as declared by that rule, does not occur where the life estate is of an equitable character and the remainder is a legal estate, or *vice versa*. Both estates must be of the same character.* The Court of Chancery does not, however, consider itself tied up to an implicit observance of the rule in respect to limitations which do not immediately vest the legal estate.†

A distinction is also given by Mr. Fearne to the effect that a trust or use created by deed will often be held to create an estate in the heirs named which cannot be cut off by the act of the tenant for life, when the same effect would not be given to an estate created by like language in a devise. The reason given, viz., that in the former case there may often occur a valuable consideration in the intention to make provision for the issue of an intended marriage does not exist when the transaction arises after marriage, but still the rule is to some extent a rule of property.‡

Mr. Cruise, however, says that the same mode of construction is adopted in case of deeds as in case of devises;§ and so is the case of *Ayer* v. *Ayer*,‖ in Massachusetts.

After commenting on various authorities on this subject,

* Fearne on Remainders, 62; Ware v. Richardson, 3 Maryland, 505.
† Fearne on Remainders, 8d ed., p. 61.
‡ Ib. 78–81.
§ 1 Cruise's Digest of Real Property, 459.
‖ 16 Pickering, 330.

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Mr. Fearne adds: "This brings us to those cases of limitations in trust, in decreeing the execution of which the Court of Chancery so far departs from that which would be the legal operation of the words limiting the trust, if reduced to a common-law conveyance, as to construe the words *heirs of the body of the cestui que trust*, although preceded by a limitation for life, as words of purchase and not of limitation." Such was the case of *Papillon* v. *Voice*,* where A. devised a sum of money to trustees, in trust, to be laid out in lands and to be settled on B. for life, remainder to trustees during the life of B., to support contingent remainders, remainder to the heirs of the body of B., remainder over with power to B. to make a jointure. It was decreed that B. should have but an estate for life in the lands so to be purchased, and Lord Chancellor King declared that the diversity was between the will passing a *legal* estate and leaving the estate *executory*, so that the party must come into the Court of Chancery in order to have the benefit of the will, that in the latter case the intention should take place and not the strict rules of law.†

The case of *Bagshaw* v. *Spencer*‡ is quite instructive in its resemblance in some of its facts, to the present case, and in the principle finally announced by Lord Hardwicke, viz., that there is a distinction between a trust in equity and a mere legal estate, and that in the latter class the words must be taken as they stand according to their legal determination, while a different rule prevailed in regard to trusts.§

Trusts are the mere creatures of confidence between party and party, totally distinct in almost every quality from those *legal* estates which are the subjects of tenure. They are in their nature independent of tenure, and therefore not the object of those laws which are founded in the nature of tenure. They are rights arising solely out of the intent of the party who created them, and therefore such intent could be the only guide in the execution of them.‖

* 2 Peere Williams, 471.
† Ib. 478.
‡ 1 Vesey, 142, S. C.; 2 Atkyns, 246, 570, 577.
§ Fearne, 88.
‖ Fearne, 89.

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Ware v. *Richardson** is a case like the one before us, governed by the laws of Maryland, and strikingly akin to it in its main facts. In that case Mrs. Kennedy, "in consideration of the natural love and affection which she hath and beareth towards Elizabeth Richardson, and in consideration of five shillings to her paid by Samuel N. Ridgely, did grant, bargain, sell, enfeoff, and convey to the said Samuel, his heirs and assigns," certain property described, to have and to hold in trust, first, that Mrs. Kennedy should enjoy the same during her own life, and after her decease, upon the further trust, that Elizabeth Richardson, during her natural life, should hold and enjoy the same, the rents, issues, and profits thereof, the same to convert to her own proper use and benefit, as if she were *feme sole*, without let or interference from her husband or liability for his debts; "and from and immediately after the death of the said Elizabeth, then to, and for the use and benefit of the legal heirs and representatives of the said Elizabeth, and to and for no other intent and purpose."

As in the present case, it was there contended that by the rule in Shelley's case Elizabeth Richardson took a fee, and that the estate was liable for her debts. The point was elaborately argued by Mr. W. H. Norris in support of this contention, and Mr. T. S. Alexander in opposition thereto, before the Court of Appeals of Maryland. That court held (Mr. Justice Mason delivering its opinion) that this deed created but an equitable life estate in Mrs. Richardson, and that it executed the legal estate in the heirs; that where the estate limited to the ancestor is an equitable or trust estate, and the estate limited to the heirs is an executed use or a legal estate, the two will not coalesce in the ancestor. The rule in Shelley's case was held not to be applicable, and the estate was adjudged to have passed upon her death to her children, Charles and Robert.

The cases of *Doe* v. *Considine*,† *Croxall* v. *Shererd*,‡ and of *Daniel* v. *Whartenby*,§ also bear upon the question before us.

* 8 Maryland, 505. † 6 Wallace, 458. ‡ 5 Id. 268. § 17 Id. 689.

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Syllabus.

In the last case the question arose under a devise "to Richard Tibbitt during his natural life, and after his death to his issue by him lawfully begotten of his body, to such issue, their heirs and assigns forever," with limitations over. It was held that the rule in Shelley's case did not govern, and that Richard took a life estate only. It is not as pointed in its authority as the case of *Ware* v. *Richardson*, for the reason: 1, that the question arose upon a will and not upon a deed; 2, that the limitation was not to Richard's heirs simply, but to a class equivalent to the children of Richard.

To adjudge that the deed of January 15th, 1867, transferred and conveyed this property in fee to Mrs. Green, so that by the common law her husband would have had as tenant by curtesy an immediate and continuing right to the enjoyment of the rents and profits during his life, and so that her two children would have in it no estate legal or equitable, would be in manifest violation of the intention of the parties to that deed. A rule of the law of tenure, which would require us so to hold, would work a monstrous perversion of justice. We are satisfied that there is no such rule, and that a compliance with the evident intention of the parties is in accordance with the rules of law.

DECREE AFFIRMED.

MORAN ET AL. v. PRATHER.

1. Where a firm, with several persons styling themselves, as a firm in this case did, "creditors of the steamboat B.," agreed to release P. (owner of ¼ parts of the boat, the rest being owned by two other persons) "from all indebtedness due us oy the said steamboat *so far as the said P. is concerned*," and where, on P.'s being about to sell to C. for a price greatly below its value had it been clear of debts, his interest in the steamer, on condition that C. would assume and pay all debts, the firm executed an agreement by which they bound themselves to defend and save the said P., free and harmless of any and all claims and demands that *may arise or be brought against said steamboat* excepting those above signed. *Held*,

(1.) That it was not allowable to show by oral testimony that the expression "steamboat debts" was a well-known term among steamboat men

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Statement of the case.

and merchants in the port where the vessel was, and meant "debts that made a lien on the boat for supplies and material," though only for six months; and that when a debt could not be enforced by any of the conservatory processes allowed by the laws of the State, it ceased to be "a debt of the boat," though it might remain a debt of the owner.

(*b.*) That the expression in the paragraph but one above, "defend and save the said P., free and harmless of any and all claims and demands that *may* arise or be brought against said steamboat," referred to debts existing at the date of the sale, and not to debts that might be contracted after it; and meant to protect the owner from all liability arising from his part-ownership of the boat, irrespectively of the fact whether the debts were liens on the boat or not.

(*c.*) That it was allowable to show that the boat was a very valuable one, and that the money price paid for her was insignificant in comparison with it, in order to infer that the purchaser had assumed the payment of existing debts against her.

2. The right of a partner to sign the firm name to a contract of indemnity in favor of third persons must be strictly proved; but it need not necessarily to be proved by a written authority to him.

ERROR to the Circuit Court for the District of Louisiana; in which court J. G. Prather filed a petition against Moran & Noble, setting forth in substance a case thus:

That he, the said Prather, with one Thoregan and two others, were joint-builders, in 1864, and jointly engaged in 1868 in navigating the steamboat Bartable; that the boat was a very valuable one, worth more than $50,000; but was liable to debts for a large amount incurred by the said owners in building and in repairing or in navigating her; that on the 25th of September, 1868, Thoregan sold his interest in the steamboat to the petitioner; the petitioner then binding himself to hold Thoregan free and harmless from all debts of the boat and owners, existing at the date of the sale, and to reimburse him for any payment that he might be compelled to make of debts then existing; that the petitioner having thus and otherwise become owner of the largest interest, that is to say, $\frac{17}{32}$ of the boat, he did in about one year afterward, that is to say, on the 21st of September, 1869, sell such interest to one Mrs. Mary Barker, for the sum, as mentioned in the bill of sale, of $6000, but that in consideration of a sale at a price so much below the value of his interest in the boat, the said Mrs. Barker was to

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assume and pay all the debts existing against the same at that time, and was to protect the petitioner against them; that not relying, however, absolutely on her ability to do this, and in order to be sure of protection against all the debts existing against the steamboat at that time, the petitioner demanded an agreement of indemnity from a commercial firm in New Orleans named Moran & Noble; that certain persons whose names appear to it, had, by the instrument first given below, released the petitioner from liability; the said instrument being thus:

"NEW ORLEANS, September 20th, 1869.

"We, the undersigned creditors of the steamboat Bartable, do hereby agree to release *J. G. Prather*, of St. Louis, from all indebtedness due us by the said steamboat, *so far as the said Prather is concerned.*

"MORAN & NOBLE.	BRADY & PALMER.
"MCCLOSKY & MASON.	J. S. SIMONDS.
"T. R. MEDLEY.	D. C. MCCAN."

That the said persons having previously released the petitioner, the said Moran & Noble, on the day previous to the sale, and as a consideration for the petitioner making sale of so very valuable a boat for the small sum of $6000, executed in this form the instrument of indemnity which he required:

"NEW ORLEANS, September 20th, 1869.

"We, the undersigned, of the city and State aforesaid, do hereby bind ourselves and our heirs, *in solido*, to defend and save the said J. G. Prather, of St. Louis, State of Missouri, $\frac{17}{32}$ owner of the steamboat Bartable, free and harmless of any and all claims and demands that *may arise or be brought against said steamboat*, excepting those above signed.

"MORAN & NOBLE."

The petitioner further set forth that Mrs. Barker did not pay the debts according to her contract; that on the contrary, a judgment for $1139 was rendered in the courts of Louisiana at the suit of one Stevenson, and another for $1127 at the suit of one Edwards against him, the petitioner, Thoregan and the other former owners; that execution

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issued on these judgments, and that he, the petitioner, was compelled to pay and did pay them; that the debts on which these judgments and executions issued were claims and demands that arose and were brought against the steamer, and were existing prior to the 20th day of September, 1869, and were embraced under the said agreement of indemnity given by Moran & Noble; that the petitioner having been thus obliged to pay the same, the said Moran & Noble under said agreement were bound to defend and save him free and harmless from said debts; but that they refused to do so, to the petitioner's damage, &c.

To the allegations of this petition there was a general denial.

The evidence showed that Mrs. Barker did not pay the debts, and that Stevenson and Edwards, not being among the creditors who released, sued Thoregan on the 22d June, 1872, and got judgment against him, which he had to pay, and that Prather repaid him what he was thus out of pocket.

The points of law and of fact, which, on the trial, seemed to be involved, were these:

I. *Whether the agreement of indemnity, which had been executed by one partner for the firm, bound the firm, unless he had authority* in writing *from the other partner to execute it.*

II. *The true meaning of the agreement of the defendants, Moran & Noble.*

The petitioner asserted that it meant that they indemnified him against any claims then existing on account of the boat—whether a lien on the boat or not—and moreover that it referred not to debts to accrue after the 20th of September, 1869 (the date of the agreement of indemnity), but to debts which, then existing, might be thereafter presented; all claims and demands, in short, which had been contracted on account of the boat, and for which he, Prather, was liable as owner.

The defendants, on the other hand, contended that the terms "all claims and demands that *may* arise or be brought," referred only to claims and demands that should arise *in futuro*, *i. e.*, should arise after the 20th of September, 1869;

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and that those terms could not cover debts due by the owners of the boat years before the execution of the instrument. They contended also that the terms "that may arise or be brought against said *steamboat*," did not include debts of the owner which could not be brought against the boat itself; in other words, debts incapable of being enforced *in rem*.

In the course of the trial, the plaintiffs, with a view of showing the truth of the allegation of the petition, that Mrs. Barker had contracted to pay the then existing debts, and that the agreement of Moran & Noble referred to them, offered a witness (one Bell) to prove that on the 21st of September, 1869, when the vessel was sold by Prather to Mrs. Barker, he was the agent of Prather to make the sale, and that he did as such agent make it; that the boat was then a very valuable vessel; that the interest of Prather in her was worth much more than the amount for which she was sold and set forth in the bill of sale from Prather to Mrs. Barker, and that it was understood at the time of said sale that Mrs. Barker should assume and protect the plaintiff from all *existing* debts of the boat and give a bond to that effect.

This testimony the court allowed to be given, and the defendants excepted.

The defendants on their part offered witnesses familiar with the custom among steamboatmen and merchants in this city and others, dealing with steamboats in New Orleans, to show that the word "steamboat debts" is a well-known term among them, and that the meaning of that word is debts that are a lien on the boat for necessary supplies, materials, repairs, and wages; and in the year 1869, and for some years before and after that date, was confined to and existed according to the laws of the State but six months against a domestic vessel, like the Bartable, from the date when the debt accrued. And that when a debt could not be enforced against the boat by any of the conservatory processes allowed by the laws of the State of Louisiana, it ceased to be a debt of the boat, though it might remain a debt of the owners.

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Statement of the case.—Charge below.

The purpose of this offer apparently was to show that the defendants had only engaged to protect Prather from debts that could be brought *in rem*, and against the steamboat, and to escape liability on the ground which they might purpose to show, that the debts which he had paid were not such debts.

The court refused to receive the testimony, and the defendants excepted.

In charging the court said:

"1st. The law is that one member of a commercial firm has no authority to bind the firm by signing the firm name to a bond executed for the benefit of third persons unless he has been especially authorized by his copartner to do so, or that his act in doing so has been ratified since it was done by his copartner, and in that event the parties would only be liable each for his share, that is, one-half each where there are two, as solidarity in obligations is never presumed, and commercial partners, though liable *in solido*, are so only in transactions connected with their commercial business. The party alleging this authority or ratification of this act must show it clearly and positively to your complete and entire satisfaction by competent evidence. It cannot be inferred and ought to be shown.

"2d. That defendants in this cause are sureties, and sought to be made liable as such. The law is that there are no presumptions against sureties; they can only be held to the precise terms of their obligation; their contract is to be construed strictly, and cannot be extended by implication beyond its express terms.

"3d. Legal agreements having the effect of law upon the parties, none but the parties can abrogate or modify them. The words of a contract are to be understood like those of a law, in their common and usual signification. Terms of art or technical phrases are to be interpreted according to their received meaning with those who profess the art or profession to which they belong.

"Now, all debts of the owners of a steamboat are not debts of the boat. In order to ascertain what are debts of a boat, you must examine the evidence, and ascertain from it what is understood by the words 'debts of the steamboat,' as contained in the contract, for if the debts claimed in this suit were not such debts as could be enforced against the steamboat, then they are covered by the bond [*sic*]. A claim against a steamboat is

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stale when the creditor has an opportunity to enforce it and neglected to do so for a reasonable time."

The court, having charged as first above mentioned, refused—

1st. To charge that the party alleging an authority or ratification from one partner to another to bind the firm by signing the firm name, must show such authority or ratification in writing.

2d. To charge that the petitioner could not recover unless he proved that the debt arose and was brought against the steamer since the date of the bond, to wit, September 20th, 1869.

3d. To charge that if the debts for payment of which indemnity was claimed in this suit were not such debts as could be enforced against the steamboat, they would not come within the terms of the agreement of indemnity; even though they should have arisen or been brought since the date of the bond, 20th September, 1869.

Verdict and judgment having been given in favor of the petitioner for the full amount of both the debts which his petition alleged that he had paid, the defendants brought the case here on exceptions to the admission of the evidence admitted, and to the rejection of the evidence rejected, as also to the charge given, and the charge refused.

Mr. Bentinck Egan, for the plaintiff in error:

1. The evidence admitted was inadmissible. The bill of sale was the only evidence of the price. Mere *circumstances* could not contradict it by showing a different price.

2. The evidence rejected ought to have been admitted. "Steamboat debts" is plainly not a legal phrase, but a technical phrase.

3. The charges refused were all, we submit, plainly fit to be given; especially the one which would not allow a partner to bind by bond his copartner, not being authorized by any instrument of equal dignity so to bind him.

Mr. Montgomery Blair, contra.

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Opinion of the court.

Mr. Justice CLIFFORD delivered the opinion of the court.

The errors assigned are: (1.) That the Circuit Court erred in excluding the evidence offered by the defendants that the words "steamboat debts" mean such debts as constitute a lien or privilege on the steamboat for necessary supplies, materials, repairs, and wages; that they do not include debts which cannot be enforced against the steamboat by any of the conservatory laws of the State. (2.) That the court erred in admitting the testimony offered by the plaintiff that the steamboat, at the time of the sale, was a very valuable vessel, that the interest of the plaintiff was worth much more than the amount for which it was sold, and that it was understood at the time of the sale that the purchaser should assume and protect the plaintiff from all existing debts of the steamboat, and that the purchaser should give a bond to that effect. (3.) That the instructions given to the jury were erroneous. (4.) That the court erred in refusing to instruct the jury as requested by the defendants.

1. Cases arise undoubtedly in which the testimony of expert witnesses is admissible to explain terms of art and technical words or phrases, and it may be admitted that a written instrument may be so interspersed with such technical terms that it would be error in the court to exclude the testimony of persons skilled in such matters, if duly offered by the proper party in the litigation.*

Terms of art, in the absence of parol testimony, must be understood in their primary sense, unless the context evidently shows that they were used in the particular case in some other and peculiar sense, in which case the testimony of persons skilled in the art or science may be admitted to aid the court in ascertaining the true intent and meaning of that part of the instrument, but the words of the instrument which have reference to the usual transactions of life must be interpreted according to their plain, ordinary, and popular meaning; and the rule is that parol

* Seymour v. Osborne, 11 Wallace, 546

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tion was taken by the defendants to the ruling of the court in admitting that testimony, which ruling is the foundation of the next assignment of errors.

Parol evidence is certainly not admissible to contradict, vary, or control a written contract, but the evidence in question in this case is not subject to any such objection, whether applied to the guarantee given by the plaintiff to his vendor or to the bill of sale given to the plaintiff by the purchaser of his interest in the steamboat. Much less was paid for that interest than its market value, the evidence of which was properly admissible as showing the surrounding circumstances at the time the bill of sale was executed, and also to show the circumstances which induced the purchaser to give the guarantee executed by the defendants.

8. Specifications of error under the third assignment involve the same question, or some phase of the same question, as that contained in one or the other of the two preceding assignments.

The defendants insisted in the court below, and still insist, that the phrase "steamboat debts" is a technical phrase, and that it did not include any debts except such as constitute a lien on the steamboat. Attempt is made to set up that theory by exceptions to the charge, as well as by exceptions to the rulings of the court, but several answers may be given to the theory, either of which is sufficient to show that the exceptions are not well founded: (1.) That the language of the guarantee is not correctly reproduced. (2.) That the phrase referred to is not a technical phrase within the meaning of the rules of evidence applicable in such cases. (3.) That by the true construction of the guarantee it includes all existing debts contracted for repairs, supplies, and running expenses for and on account of the steamboat, for which the plaintiff, as owner, was liable at the time of the sale and purchase.

Evidently the object of the agreement of guarantee was to secure the plaintiff against all liability arising from his part-ownership of the steamboat. It was his liability and not that of the steamboat which was to be protected from "all

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claims and demands that may arise or be brought against the steamboat."

4. Certain requests for instruction were also presented by the defendants which were refused by the presiding justice, and the court here is of the opinion that all of them were properly refused.

Partnership may be proved by parol as well as by written evidence, which is sufficient to show that the ruling of the circuit judge in refusing the first request is correct, and enough has already been remarked in response to the first exception to show that the other requests for instruction were properly refused, for the plain reason that every one of them sets up an erroneous theory of the guarantee which is the foundation of the suit.

Evidence of usage was offered by the defendants to limit the legitimate scope and operation of the instrument of guarantee, but it was excluded by the court for reasons so manifestly proper that no argument is necessary to vindicate the action of the court.*

Usage cannot be incorporated into a contract which is inconsistent with the terms of the contract; or, in other words, where the terms of a contract are plain usage cannot be permitted to affect materially the construction to be placed upon it, but when the terms are ambignous usage may influence the judgment of the court in ascertaining what the parties meant when they employed those terms.

Apply those rules to the case and it is clear that the theory of the controversy assumed by the circuit judge in all his rulings and in the instructions which he gave to the jury is correct. Conclusive proof of that proposition is found in the language of the guarantee, by which the defendants covenanted to save the plaintiff free and harmless of any and all claims and demands that may arise or be brought against the steamboat, except such as were relinquished by the instrument in writing executed on the same day.

JUDGMENT AFFIRMED.

* Thompson v. Riggs, 5 Wallace, 679; Bliven v. New England Screw Company, 23 Howard, 431; Addison on Contracts, 6th edition, 935.

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EX PARTE MEDWAY.

Where on certain facts found by the Court of Claims—it refusing to find as a fact a certain allegation which the petitioner in the suit requested it to find—that court has given judgment against the petitioner, and the petitioner has taken the record to this court, which, upon considering the case found, reverses the judgment of the Court of Claims and remands the cause "for further proceedings in conformity with law and justice," there is nothing which prevents the Court of Claims from setting aside the findings of fact which it had made on the first trial and from trying the case *de novo*.

ON petition for mandamus.

The case was thus: Medway had filed a petition in the Court of Claims for the recovery, under the Abandoned and Captured Property Acts, of the proceeds of ninety-four bales of cotton, of which he alleged himself to have been the owner, and which he alleged had been seized and sold by the United States, who now had the net proceeds, $17,386.20, in their treasury. A trial was had, and the court found as facts that the claimant was the owner of the number of bales stated, that they had been captured by the United States military forces at Wilmington, North Carolina, in February, 1865; that they had been turned over to the Treasury agent at Wilmington, and sold in New York, in August, 1865; and that the net proceeds thereof were in the treasury.

But it refused to find as another fact that which the plaintiff requested it to find, namely, "that the whole amount of net proceeds of the said bales was $17,386.20."

Judgment was rendered against the plaintiff, who thereupon appealed to the Supreme Court.

The Supreme Court reversed the judgment and remanded the cause for further proceedings, "in conformity with law and justice." The record in the Supreme Court contained the foregoing findings, and showed the failure of the Court of Claims to make the computation and state the amount of proceeds.

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Argument against the return.

The plaintiff then filed the mandate in the Court of Claims, and moved that court to proceed with the case from the point reached by the reversal, which proceeding he alleged would be "in conformity with law and justice." The court, however, refused to so proceed, and on the contrary, on the 5th of April, 1875, ordered that all the findings of fact originally made and filed, and upon which the case had been heard in the Supreme Court, should be set aside and held for naught, and that a trial be had *de novo*.

Mr. Thomas Wilson, for the plaintiff, now filed a petition in this court, setting forth these facts and praying that the judges of the Court of Claims show cause why a mandamus should not be issued to the said court, to compel it to vacate its said order of April 5th, 1875, and it proceed in obedience to the mandate of this court, and in conformity to law and justice in the case.

The judges of the Court of Claims showed for cause—

1st. That the mandate of the Supreme Court left the Court of Claims to decide what further proceeding in the case would be in conformity to law and justice; and

2d. That it was in conformity to law and justice to set aside the findings of fact which had been made on the first trial, and try the case *de novo;* and thereupon the said order of April 5th, 1875, was made.

The question now was upon the sufficiency of the return.

Mr. Thomas Wilson, for the petitioner:

The court below having once tried the case, and having decided every question of fact arising in it, except making the computation and statement of the amount in dollars and cents, and having filed its findings in the nature of a special verdict, and an appeal having been had to the Supreme Court, which reversed the judgment and remanded the cause for further proceeding, the court below should be now required to proceed from the point reached by the reversal, and cannot go back over and retry those questions of fact which were settled and determined on the former trial, and

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which, being certified to the Supreme Court on appeal, formed the basis of its reversal.*

The finding of facts set forth in the record remained on file in the Court of Claims; it continued to be part of its record. The judgment alone was reversed. The finding of fact remained unreversed and in full force, the same as would a case stated, the report of an auditor, or a special verdict. But for this finding as to ownership, seizure, sale, and proceeds in the treasury, the judgment would not have been reversed. It was upon these findings that the reversal was made; yet the Court of Claims, upon regaining jurisdiction of the case, so far ignore the action of the Supreme Court as to strike out and set aside the finding of those facts upon which that court based its reversal.

If the proposition which we contend for is incorrect, then no decision of the Court of Claims is final *upon the facts*, and the different issues in a case may be determined *seriatim*, with an appeal to the Supreme Court intervening between each decision. If upon each reversal and remanding there be allowed a trial *de novo*, there may be injected another and a new defence, which may result in another decision upon another issue, and the granting of another appeal, and so on, until the last issue is disposed of by the second, third, or perhaps fourth appeal, the number of appeals being limited only by the number of issues in the case.

This is the inevitable result of the position taken by the Court of Claims. That it is erroneous is obvious.

Mr. John Goforth, Assistant Attorney-General, contra.

The CHIEF JUSTICE delivered the opinion of the court.

Our mandate required the Court of Claims to proceed in the cause remanded in conformity to law and justice. We did not undertake to direct what law and justice did require, any further than to say that upon the finding of facts ap-

* Cameron v. McRoberts, 3 Wheaton, 591; White v. Atkinson, 2 Call, 376*; Price v. Campbell, 5 Id. 115.

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pearing in the record sent to us upon the appeal, the judgment was erroneous. In everything else the Court of Claims was left free to proceed with the cause in its own way and according to its own judicial discretion. That discretion we cannot control in this form of proceeding.

PETITION DISMISSED.

RAILROAD COMPANY v. WISWALL.

The order of a Circuit Court remanding, for want of jurisdiction to hear it, a case removed from a State court into it, is not a "final judgment" in that sense which authorizes a writ of error. The remedy of the party against whose will the suit has been remanded, is by mandamus to compel action, and not by a writ of error to review what has been done.

ON motion to dismiss a writ of error to the Circuit Court for the Southern District of Illinois. The case was this:

Wiswall, a citizen of Illinois, sued, in one of the inferior State courts of the State just named, the Chicago and Alton Railroad Company. The company conceiving that the case was properly cognizable in the Circuit Court of the United States for that district—the Southern District of Illinois—got an order from that court, the court below, commanding the State court to send the record to *it*. This the State court did. However, upon looking further into the matter, the Circuit Court was satisfied that it had no jurisdiction, and on motion of the plaintiff remanded the case to the State court. To that remand the railroad company took a writ of error from this court, and this writ it was which Wiswall now moved to dismiss; the ground of the motion being that the remand was not a "final" judgment or decree, and that the proper proceeding of the company was a motion for mandamus on the court below* to act, and not by writ of error to review what was done.

Mr. E. C. Brearly, in support of the motion; Mr. P. Phillips, contra.

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* Insurance Company v. Comstock, 16 Wallace, 258.

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The CHIEF JUSTICE delivered the opinion of the court.

The writ of error is dismissed upon the authority of *Insurance Company* v. *Comstock*.* The order of the Circuit Court remanding the cause to the State court is not a "final judgment" in the action, but a refusal to hear and decide. The remedy in such a case is by mandamus to compel action, and not by writ of error to review what has been done.†

UNITED STATES v. SHREWSBURY.

Where, under a contract entered into between the government and a transporter of military stores, in the wilds of the West, it was provided that a board of survey, composed of military officers, should on the arrival of the stores at their place of delivery, examine the quantity and condition of the stores transported, and "in case of loss, deficiency, or damage, *investigate the facts and report the apparent causes, assess the amount of loss and injury, and state whether it was attributable to neglect or want of care on the part of the contractor or to causes beyond his control*," a copy of which, said the contract, "shall be furnished to the contractor, shall be attached to the bill of lading, and shall conclude the payments to be made"—*Held*, that a report which did not report investigation of facts and the apparent causes, nor state whether the loss was attributable to neglect or the want of care on the part of the contractor or to causes beyond his control, but which merely on its face found the deficiency and charged it accordingly would be supported; the contractor not having at the time objected either as to the form or the substance of the report, when it was made; and objecting only when he came and got his money; when witnesses were scattered and gone, and most of them difficult if not impossible to be found; and then notifying to the quartermaster nothing more definite than that he, the contractor, would claim a readjustment and full damages.

APPEAL from the Court of Claims.

The case as found by the Court of Claims was thus:

On the 27th of March, 1865, W. S. Shrewsbury entered into a contract with the United States to transport army

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* 16 Wallace, 270.

† King v. The Justices of Gloucestershire, 1 Barnewall & Adolphus, 1; 1 Chitty's General Practice, 786; Ex parte Bradstreet, 7 Peters, 647; Ex parte Newman, 14 Wallace, 165.

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stores from Fort Leavenworth, Kansas, and other forts there and in Missouri, to Fort Lyon and other forts in the Territories of Colorado and New Mexico.

The contract contained a clause thus:

"In all cases where stores have been transported by the said Shrewsbury, under this agreement, a board of survey shall be called without delay, upon their arrival at the point of destination or delivery, to examine the quantity and condition of the stores transported, and in cases of loss, deficiency, or damage, to investigate the facts and report the apparent causes, assess the amount of loss or injury, and state whether it was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control; and these proceedings, a copy of which shall be furnished to the contractor, shall be attached to the bill of lading, and shall conclude the payments to be made on it.

"For loss of weight due to shrinkage . . . the contractor shall not be liable, if the packages are delivered in good order and condition, and the board of survey shall be satisfied that such shrinkage did not arise from neglect or want of care on the part of the contractor or his agents.

"For deficiencies or damages, the contractor shall pay the costs at the point he receives the articles, and freight shall be deducted in the latter case in proportion to the amount of damage assessed. Should no board of survey be called, through failure on the part of the quartermaster's department or other military authority to convene one, it shall be considered that the contractor has delivered all the stores, as specified in the bill of lading, in good order and condition, and he shall be paid accordingly."

On the 2d of June, 1865, one of Shrewsbury's transportation trains—train No. 124—received, at Fort Leavenworth, 858 sacks of corn, weighing in the aggregate 101,860 pounds, averaging 118¾ pounds per sack. The train arrived at Fort Lyon, Colorado, in the latter part of July, and delivered the corn in good order, except that 9 sacks, amounting to 1069 pounds, were lost. But, by reason of the difference or imperfection of the scales used in the determination of the weight of the remainder and the shrinkage in weight upon

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the road, the remaining 849 sacks were reported to weigh only 97,620 pounds instead of 100,791 pounds, their weight when they left Fort Leavenworth, and Shrewsbury was charged with the loss of 3171 pounds. A board of survey was ordered on the 31st July, 1865, which met on the 1st August, 1865, and examined the supplies delivered.

The following were the proceedings of the board, as reported to the commanding officer, and as attached to the bill of lading:

"Proceeding of a board of survey which assembled at Fort Lyon, C. T., by virtue of the following order, viz.:

"HEADQUARTERS, FORT LYON, C. T.,
"July 31st, 1865.

[Special Order No. 145.]

"A board of survey is hereby ordered to meet at the commissary building to-morrow morning, at 9 o'clock, or as soon thereafter as practicable, to examine and report upon the quantity and condition of certain commissary and quartermaster stores being received by Lieutenant C. M. Cossett, Acting Assistant Quartermaster, and A. C. S.

"*Detail for the Board.*

"First Lieutenant J. A. Cramer, veteran battalion, First Colorado Cavalry.

"First Lieutenant Henry Gronheim, Fifteenth Kansas Cavalry.

"By order of Theo. Conkney, captain, commanding post.

"JAMES OLNEY,
"Second Lieutenant and Post Adjutant.

"FORT LYON, C. T.,
"August 1st, 1865.

"The board met pursuant to the above order.

"Present: First Lieutenant J. A. Cramer, veteran battalion First Colorado Cavalry, and First Lieutenant Henry Gronheim, Fifteenth Kansas Cavalry, and proceeded to examine the supplies delivered by freight contractor W. S. Shrewsbury, in contractor's train No. 124, Fort Lyon, No. 5, and find as follows:

"Packages all correct, and in good order, with the exception of nine sacks of corn deficient; weight agreeing with the bill of lading with the exception of 4240 pounds of corn deficient.

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"The board, therefore, recommend that the deficiency of corn be charged to the freight contractor, and that Lieutenant C. M. Cossett, Acting Assistant Quartermaster, be permitted to drop said deficiency from his return.

"The board then proceeded to other business."

These minutes were signed in form by the officers composing the board.

In pursuance of the foregoing recommendation Shrewsbury was charged by the quartermaster department for the loss of 9 sacks of corn, and in addition to the 9 sacks of corn with the 3171 pounds of difference in weight of the remainder of the corn before mentioned, and for this difference $449.61 was deducted from his account. He had never been paid this balance. A general account was stated between the parties showing the amount allowed and deducted, entitled:

"An account for the transportation of military stores from Fort Leavenworth, Kansas, to Fort Riley, Kansas, under contract with the United States, dated March 27th, 1865, as per the accompanying bills of lading, receipts, and proceedings of boards of survey, to wit."

The claimant was paid the total of the amounts allowed, and at the foot he gave the following receipt:

"Received, at Fort Leavenworth, Kansas, the 23d of October, 1865, of Captain H. L. Thayer, Assistant Quartermaster, United States Army, the sum of $91,243.60, in full of the above account.

"W. S. SHREWSBURY."

At the time of receiving payment Shrewsbury protested against the deduction, and notified the quartermaster who made the payment that he should look to the United States for a corrected adjustment and full payment.

The Court of Claims, upon the foregoing facts, decided as conclusions of law:

That as to the shrinkage of corn and difference of weight, the proceedings of the board of survey did not conform to the terms of the contract, inasmuch as the board did not investigate the facts nor report the apparent causes, nor state

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whether the loss was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control; and that for the amounts thus withheld the claimant should recover.

Nott, J., in delivering the opinion of the court said:

"The sacks of corn averaged 118¾ pounds per sack. It is, therefore, apparent that the nine missing sacks (for which no claim is made by the contractor) could not have weighed 4240 pounds when received at Fort Leavenworth, and that if 'the packages' were all correct and in good order, as found by the board, the deduction ordered was an arbitrary deduction, which any clerk could have made by a simple comparison of the two weights, and which involved the exercise of no real examination or discretion.

"But the rule which the parties established for themselves by their agreement was, that in case of 'deficiency' the board of survey should 'investigate the facts and report the apparent causes and assess the amount of loss or injury, and state whether it was attributable to neglect or the want of care on the part of the contractor, or to causes beyond his control.' In none of these particulars do the proceedings of the board in any manner carry out the intent and terms of the contract. The board did not investigate the facts, it did not report the apparent causes, it did not state whether the loss was attributable to neglect or to the want of care on the part of the contractor, or to causes beyond his control. As to all of these particulars the contractor had the right to receive the investigation of the board, and the contract was so rigid in assuring him of that right, that it provided that if the other party, who alone had the right to convene a board, should fail to do so, he should be deemed to have 'delivered all the stores, as specified in the bill of lading, in good order and condition, and be paid accordingly.' We do not mean to say that the failure of a board to investigate after it has been properly convened will work the same result in favor of a contractor, but we do think that when a board is convened it must carry out the intent of the agreement in its investigations, or else that its proceedings will not be conclusive and binding upon the contractor."

The judgment of the court was that the claimant recover. The United States took this appeal.

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Mr. G. H. Williams, Attorney-General, and Mr. John Goforth, Assistant Attorney-General, for the appellant:

1. The reports of the board of survey contained everything made necessary by the terms of the contract. The condition of the stores was reported, the deficiency in weight noted, and the liability of the contractor for damages and deficiencies, contained in the recommendations of the boards. The exact form of report was left to the judgment of the boards.

2. If there were any informalities in the reports of the boards of survey, the claimant waived them by acquiescence in the conclusions of the reports, and acceptance of payment on the vouchers or bills of lading, which included the deductions ordered by the boards, as in full of all services of the various trains against which the boards had charged deficiencies. The agreement was to submit the questions of the condition and quantity of the stores transported by the claimant to boards of survey, and their reports were to be conclusive as to the payments to be made on the bills of lading or vouchers. Boards were ordered, and they met and examined the transported stores, and their proceedings were attached to the bills of lading. No protest or objection was made to the composition, the proceedings, or reports of the boards, nor any charge made of informality in the proceedings or reports. The claimant accepted the conclusions of the boards, as in full payment of all services rendered, and then protested against the deductions made by the boards. The boards were in the nature of an arbitration, acting for both parties.

Where there is a submission to arbitration, after a ratification of an award and execution of its requirements, it is too late for the parties to set up any defect in the proceedings or in the award.*

3. The taking of the amount allowed by the boards of survey appointed pursuant to the contract, *i. e.*, by the act of both parties, and giving the receipts as in full payment for

* Hoogs v. Morse, 31 California, 128; Tudor v. Scovell, 20 New Hampshire, 174.

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all services rendered by certain trains, bring the case within the ruling of the Supreme Court in the cases of *Justice*,* of *Mason*,† and of *Sweeney*,‡ notwithstanding a promise on the part of the claimant to look elsewhere for the amount of the deductions. In fact this case is more favorable for the United States than those quoted, because it is an acceptance of an award which the contract says shall conclude all payments on the bills of lading.

Mr. C. F. Peck, contra:

1. It was optional with the government whether a board of survey should be called in any case. Its proceedings were to be all for the benefit of the defendant, its action and proceedings were *ex parte*, and it was composed entirely of government officers. On these accounts it is the more imperative that the contract be construed strictly. If no board should be called, it was to be considered that no deficiency existed, and that full payment should be made.

The contractor consented that the officers constituting the board of survey might, for the purpose of ascertaining whether he had done his duty, do certain things, viz.:

1st. Examine the quantity and condition of the stores transported, and in cases of loss, deficiency, or damage,

2d. To investigate the facts.

3d. To report the apparent causes.

4th. To assess the amount of loss or injury.

5th. To state whether it was attributable to neglect or want of care on the part of the contractor or to causes beyond his control.

These five points were to be passed upon by the board, if the government questioned his claim to full pay; but if they undertook to act at all, they were to act in the way prescribed.

The court below, whose conclusions of fact cannot be appealed from, says truly:

"The board did not investigate the facts; it did not report

* 14 Wallace, 585. † 17 Id. 67. ‡ Ib. 75.

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the apparent causes; it did not state whether the loss was attributed to neglect or the want of care on the part of the contractor, or to causes beyond his control."

The board, therefore, ended the investigation where it should have begun it. Having ascertained that there was a deficiency, and the amount of it, then the issue arose as to whom it should be charged. For this purpose they were required to go on and investigate the facts concerning the deficiency, to report the apparent causes of the deficiency, and to state whether, in their judgment, it was attributable to neglect or want of care on the part of the contractor, or to causes beyond his control.

The proceeding which was provided for secured a body in the nature of arbitrators. Now, it is settled that the power and authority of an arbitrator is derived entirely from the submission; he must therefore make his award strictly in pursuance and in conformity with the submission. It is a general rule that unless the arbitrator makes his award of all matters submitted to him the award is entirely void.

2. It is next said that if there were any informalities in the reports of the boards of survey, the claimant waived them by acquiescence in the conclusions of the reports and acceptance of payment on the vouchers or bills of lading.

The argument proceeds upon the misapprehension that the contractor obtained an award in his favor, and received the money. Such is not the fact. The board of survey had no jurisdiction over the matter of freight-money; that was definitely fixed by the contract, there was no controversy concerning it. There was no award, and could be none, as to the moneys earned by the contractor, but the report had reference solely to the counter charges claimed by the United States. The moneys received by the claimant had no reference to the matters considered by the board, and they were both paid and received with an explicit understanding that it was not to be a final adjustment.

The two cases cited on the other side in support of an opposite view, are based upon the principle that a party cannot take the benefits of an award without accepting its

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disadvantages. There is no such principle involved here. The claimant took that which had no relation to the controversy, submitting for the time to the reduction, but giving notice that he would claim the amount withheld.

3. The final ground of defence is that the claimant is concluded by the acceptance of the money and the receipt he signed.

The gist of the inquiry is whether the money was paid and accepted as a satisfaction. Undoubtedly, if it was, there is an end of the case. If it was not, the right of action remains.

This court has had occasion to repeatedly consider the precise question, under what circumstances will the payment and receipt of money be held as sufficient evidence of this satisfaction? Of course the intention of the parties must govern, not the secret intentions or mental reservations, but the intention as evidenced by their acts and plain declarations. There is nothing in any of the cases cited by the other side—neither Justice's, nor Mason's, nor Clyde's—which deny this.

Even upon the extreme view taken by the Attorney-General, that the board of survey passed upon the whole claim, and that the claimant accepted the money under its award, it was only required in order to preserve all of his rights that he should protest at the time of receiving the money that it was not in satisfaction of the whole claim.* If after such protest the officers saw fit to pay him, his status was not affected by such payment.

Mr. Justice SWAYNE delivered the opinion of the court.

The counsel for the appellee maintains that the Court of Claims in holding as it did for nought the findings and recommendations of the board was right, because the agreement was, that in case of deficiency, the board should "investigate the facts and report the apparent cause, and assess the amount of loss or injury, and state whether it was attrib-

* United States v. Justice, 14 Wallace, 585.

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utable to neglect or want of care on the part of the contractor, or to causes beyond his control," and that their proceedings failed to carry out the intent and terms of the contract in these particulars. This is too narrow and technical a view of the subject. The provision of the contract touching the board was important to the government. The points of delivery were in the wilds of the West. If there was any failure by the contractor, the time and place of delivery were the time and place to ascertain the facts, and to put the evidence in an effectual shape. Afterwards it might be impossible for the government to procure the proofs, and if it were done, the expense might greatly exceed the amount of the items in dispute. At the delivery, the bill of lading spoke for itself. The teamsters and guards who accompanied the train were present, and could readily be examined. It is said by the Court of Claims, in their conclusions of law, that the board failed to make the requisite investigations of the facts. To do this was one of the most important duties devolved upon them. It is to be presumed they discharged it. They did not say, in terms, that they had done so, but they reported conclusions carrying with them the strongest implication that what was recommended rested on a basis of ascertained facts. The board, as honest men, could not have announced such results without the proper previous examination. The means were at hand, and the work was easy. A formal and technical instrument was not to be expected from military men acting under such circumstances. We think the reports were sufficient, and that they conform in every substantial particular to the requirements of the contract.

It does not appear that the contractor objected either as to form or substance when the reports were made, nor that he disclosed any objection subsequently until the time of payment. Nor did his objections then assume a definite shape. He notified the quartermaster that he should claim "a readjustment and full payment." The reasons and grounds of the claim were not stated. The payments were made at a distant point and after the lapse of several months.

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The witnesses were then scattered and gone. Most of them doubtless were difficult if not impossible to be found. As the contractor was silent when he should have spoken, he cannot be permitted to speak at the later period, in the altered condition of things, which then existed, as regards the other party. He must be held to have waived any exception which he might have taken at the proper time, and to have been, when the payments were made, finally concluded.

JUDGMENT REVERSED, and the case remanded, with directions

TO DISMISS THE PETITION.

Mr. Justice FIELD dissented.

THE TREMOLO PATENT.

TREMAINE *v.* HITCHCOCK & Co. HITCHCOCK & Co. *v.* TREMAINE.

1. An amendment which changed the character of a bill, allowed even after final decree, the circumstances being peculiar and the cause having been, in fact, tried exactly as it would have been if the bill had originally been in the amended form.
2. The defendants, venders of organs generally, and selling sometimes organs having a patented invention consisting of a combination of what was called a "tremolo attachment," with the organ; and selling sometimes organs without the attachment, were decreed guilty, in their sales of organs with the attachment, of infringing the complainant's patent. *Held*,
   i. That in the ascertainment of profits made by them from sales of the organs with the tremolo attachment, it was proper to let them prove the general expenses of their business in effecting sales of organs generally, and deduct a ratable proportion from the profits made by the tremolo attachment.
   ii. That the master in the present case, for the particulars of which the reader must see the statement of the case (*infra*, page 520), had ascertained on right principles the general expenses.

ON cross appeals from the Circuit Court for the Southern District of New York.

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Statement of the case.

Hitchcock & Co., owners by assignment of a patent to one Carpenter, which had been twice reissued to themselves, filed a bill in the court below against Tremaine and others, vendors of organs generally and other musical instruments, to enjoin their sale of what was known as a "tremolo attachment," an appendage sometimes made to organs; the purpose of which is to make a tremolo or vibratory note, preserving at the same time, as far as possible, its smoothness, fulness, and power.

This tremolo attachment was no necessary part of an organ; but, as its name declared, an "attachment;" an optional device, used or not used at pleasure.

The defendants, who, as already said, were venders of organs generally, and who bought different sorts of organs from the different makers of them, had and sold organs with the attachment (buying them from persons not licensed), and organs without the attachment. For those containing the attachment they paid an additional price, and they sold them also for more than those which did not have the attachment.

The defendants answered the bill, and the case having been heard, and they decreed guilty of infringement, it was referred to a master to take an account of profits, the order of reference directing—

"That he permit the defendants to prove the general expenses of their business incurred alike to effect the sale of all goods (*i. e.*, not specifically incurred in reference to any particular class or kind), said general expenses to be apportioned by the master, and a part of the same, bearing the same proportion to the whole that the gross sum received from sales of the infringement bears to the gross sum received by the defendants from all sales in their said business, to be added to the expense of the infringing tremolos, and allowed to the defendants."

In taking this account, the master did accordingly allow the defendants to prove the general expenses of their business incurred in effecting the sales of *all* musical instruments, and deduct a ratable proportion from the profits made by the sale of tremolo attachments. To explain, he reported thus:

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Statement of the case.

"1st. That the gross sum received by the defendants from all sales in their said business, during the period specified, was $91,165.32.

"2d. That the gross sum received by the defendants from sales of the infringement was $3913.96.

"3d. That the general expenses of their business incurred alike to effect the sales of all goods was $16,868.93.

"4th. That the proportion of such general expenses applicable to the tremolo, pursuant to said order, is $729.22.

"5th. That if said proportionable part of the expenses be added to the expense of the tremolo, or deducted from the profits previously reported, to wit, $1238.48, the profit derived by the defendants from the infringing tremolo will amount to the sum of $509.26."

No detailed statement of general expenses was offered before the master on the part of the defendants, nor did they prove specific items of general expense, except the items of rent, salaries, freight, and cartage, advertising, insurance, gas, and fuel. They made a general statement, however, and introduced their books in cross-examination. Both parties submitted analyses of these books. The master adopted the figures of the defendants' analysis except, where he considered them at variance with the previous sworn testimony, and he allowed as general expenses certain sums and items, including:

Stationery and printing,	$1405 28
Telegraphing,	47 78
Office furniture and fixtures,	289 35
Expressage,	28 12
Labor,	79 80

And disallowed eight various large items.

The complainants excepted:

1st. To the deduction from the profits made on the sale of the tremolo attachments of a ratable proportion of the general expenses of the defendants' business.

2d. To the way in which the master ascertained the general expenses.

The court, however, confirmed the master's report, and a decree was entered accordingly.

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Soon after this was done, it was discovered that the case had been tried on issues not made in the pleadings; that the complainants in taking their proofs had put in evidence a reissue different from and later than the one which they had set out in their bill as the ground for their complaint, and that the bill had never in any way been amended.

As to this new matter now brought up after decree made, the case was thus:

The bill set forth that a patent for the "attachment" had been granted on the 27th day of June, 1865, to one Carpenter; that subsequently he assigned the letters-patent to the complainants; that on the 18th day of May, 1869, they surrendered the patent, and obtained a reissue to themselves (**No. 3444**), and that the defendants had been guilty of infringing their rights under the patent.

To the complaint thus exhibited the defendants answered, admitting the grant of the letters to Carpenter, but denying all knowledge as to the truth of the allegations that Carpenter had at any time assigned his interest to the complainants, or to any one or more of them; and, *therefore*, denying that the complainants had any interest in the said letters-patent or to the "*reissues*" of the same as set forth in the bill of complaint. The answer further averred that Carpenter was not the original inventor of the tremolo attachment, but that it was known and was in use before his alleged invention was made. It denied that the defendants had infringed upon the rights and privileges granted by the patent dated June 27th, 1865, "*or by* ANY *of the reissues of the same.*"

To this answer a general replication was put in and the parties went to trial, when the complainants gave in evidence, without objection, reissued letters-patent **No. 3665**, dated October 5th, 1869, which had been granted on the surrender of the first reissue No. 3444. This second reissue was not set out in the bill, but it was obvious enough that both parties supposed it was, through all the progress of the trial. As already said, the answer denied infringement, not of the single reissue mentioned in the bill, but of any of the reissues. No other reissue than No. 3665 was put in

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evidence. The decretal order to account mentioned it in terms. The evidence taken by the master under the order of reference related only to attachments sold by the defendants after the second reissue was granted. In the exceptions taken by them to the master's report no intimation was made that the rights of the complainants under the reissue No. 3665 were not on trial, and not even when the final decree was made was it suggested that the parties had been trying the case on an issue not made by the pleadings.

After the final decree had been made, the complainants applied to have the bill of complaint amended by inserting in it a declaration on the reissued letters-patent which were decreed to be valid, and the court below made an order containing a recitation of alleged facts to authorize the order amending the bill as prayed for.

There was no allegation that the bill of complaint ever contained the allegation as to reissue No. 3665, prior to the judgment. The motion and the order were not made "to *conform* the bill to the proofs."

Both parties appealed; the complainants because of the confirmation of the report in the face of their two exceptions to it; the defendants because of the amendment allowed in the bill after a final decree made.

Mr. F. H. Betts, for the complainants below:

1. *No part of the general expenses are justly allowable to the defendants.*

The method of computation of profits was erroneous. It forgot that the patent is not for the tremolo itself, but for the *combination* of the organ and tremolo.

If an extra price is received for the combination, without any additional expense being incurred, the whole of that extra price is obtained by the addition of the combination.

It does not avail the defendants to charge a portion of their general expenses against the tremolo, one member of the combination, for in so doing they take off the exact amount from the other member, the organ. The profit on the whole combination is still equal to the exact amount by

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which the extra price received by reason of the making of the addition exceeds the amount received for the organ alone. This, for example, is expressed in figures thus:

Cost of organ, $100; received for organ, $200. Cost of tremolo, $12.50; received for tremolo, $25. Amount of general expenses apportioned to each organ, $50; no additional amount incurred by reason of tremolo.

If all, $50 is charged against organ alone. Profit on tremolo alone is $12.50. If $45 is charged on organ and $5 on tremolo, we still have $12.50 as the profit received *for the combination; i. e.*, $7.50 on tremolo itself and $5 on organ, *by reason of adding tremolo.*

The same result follows from any apportionment.

Any other rule than this would enable an infringer to add patented devices to his instrument, charge extra prices for them, and thereby increase his profit on his instruments by the exact amount of the proportion of his general expenses that his sales of the infringing device bear to his general business. In other words, the more he infringes the more of the general expenses he diverts from the main instrument, and thereby the more profits he makes without being accountable for it.

The true rule is, if the infringing devices are an integral part of the whole instrument, without which it is incapable of use, and for which a single charge is made, then in determining profits on a part of the organization general expenses are to be apportioned according to cost, or by some other equitable rule.

But when the infringing device is an *optional* one, used or not, at pleasure, and an extra price is charged and received for it when used, the true profit made is the extra sum received for the *addition*, only such expenses being allowed as are incurred by reason of the addition.

It may be urged that as the tremolos induced the sale of organs, and as the sale of organs involved expense, therefore the tremolo must bear its proportion of such expense. This is a plausible position, but in this case the sales of organs produced a profit beyond the profit of the tremolo.

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Every sale of an organ which was induced by the presence of a tremolo, instead of creating an expense which lessened that part of the profit measured by the difference between the cost and sale price of the tremolo, not only wholly paid such expense, but added additional profit for the organ. If it be the fact, as it doubtless was, that the presence of the tremolo combination increased the sales of organs, so far from the tremolo combination being charged with anything on that account, it ought to be credited, not only with the difference between its cost and sale price, but also with the additional net profit on the whole instrument whose sale was thereby effected.*

If it would have been impossible to have sold any organs without the tremolo, the whole net profit would have been properly credited to the tremolo.

If half the sales were due to the tremolo combination, to the tremolo is due the profit caused by its own extra price plus one-half of the balance of net profit on the whole instrument, and if the addition of the combination produced no effects, yet still in fairness it ought to be credited with its own *extra* profit, and not charged with any part of expenses it contributed nothing to incur.

The contingency of the presence of the tremolo having retarded sales is not supposable in this case; but if it were, it should still be credited with its own profit and charged with any loss on sales of the whole instrument.

2. "*The master erred in that he has allowed as part of the expenses of business, to be apportioned as general expenses, and has credited a part thereof to the defendants, against the said infringement, the following items:*

"1*st. Stationery and printing*, ...	$1405 28
2*d. Telegraphing*, ...	47 28
3*d. Office furniture and fixtures*, ...	289 35
4*th. Expenses*, ...	28 12
5*th. Labor*, ...	79 80

"*Whereas he ought not to have credited the defendants, or taken*

* McCormick *v.* Seymour, 3 Blatchford, 225; Seymour *v.* McCormick, 19 Howard, 96; Whitney *v.* Mowry, 4 Fisher, 145; Carter *v.* Baker, Ib. 404.

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into the account any portion of said sums, because said defendants did not prove what part, if any, of said expenses were allowable under the order of reference."

If a proportion of the general expenses are to be deducted, then the defendants must bring themselves within the order, and, in regard to that order, the following things are to be noted:

1. A division of expenses is to be made into "general" and "particular."

The "general" expenses being those incurred for *all* goods alike, such as rent, clerk hire, general advertising, &c., the particular expenses being those caused by certain particular goods, and not by reason of selling all the goods, such as cartage on particular instruments, commission of particular sales, &c.

2. The burden of distinguishing between these two classes is upon the defendants. To them alone were the facts known, and it was just and proper that they, and not the complainants, should be required to prove them.

The defendants, by the order, were to be "*permitted*" to prove their "*general*" expenses, as distinguished from the particular ones. Unless they showed, therefore, what their "general" expenses were as distinguished from "particular" ones, the master had nothing to do but to report as before.

The defendants show generally that they had incurred certain items of expense, *i. e.*, stationery, printing, telegraphing, expressage, labor, &c.

Now, each and all of these items may be items of general expense, or they may be particular expense, or they may be part one and part the other.

The defendants have failed to show what part of these expenses is "general" and what part "particular;" they have failed to do this, and therefore the items should be disallowed.

3. *The amendment even after final decree was properly made.*

It is perfectly plain from the statement of the case that all parties, complainants, defendants, and court proceeded upon an assumption that the bill was founded on the re-

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issue No. 3365. To defeat a suit in such a case would be acting quite too technically.

Mr. B. E. Valentine, contra:

If the complainants showed a title to the reissue on which the bill was founded, it would be worth while to consider the two exceptions which they make to the master's report; and to show, as we easily could, that the master's report was made on right principles, and the deductions allowed by him in our favor rightly allowed. But the complainants show no title at all under the reissue No. 3444, on which they base their bill. It had been surrendered. The surrender is a solemn declaration that that reissue was void. It has not been and could not be put in evidence. On the other hand, an issue which has been put in evidence is not relied on in the bill, nor indeed so much as referred to in it. A final decree is made on the unproduced, non-existent, and void reissue set forth in the bill, and after final decree the bill is amended so as to let in the proofs. *Such* an amendment is in the face of all rules and all practice in equity.

It was not an amendment of mere *form*, but was an amendment of substance, inasmuch as a separate and distinct subject-matter of litigation was introduced.

No matter what the amendment sought, inasmuch as it was sought *after replication*, the complainants were not at liberty to amend except on affidavits reciting, among other things, that "the matter of the proposed amendment could not with reasonable diligence have been introduced sooner into the bill."*

In the absence of special rules, it is well-settled law that a bill in equity cannot be amended after the cause is set down for hearing, in any other respect than by making parties.†

In this cause the amendment was not asked for until *after judgment*, and the defendants were deprived of the absolute right which they had to file an *amended answer* or plea.‡

* Equity Rule 29. † Goodwin v. Goodwin, 8 Atkyns, 870.

‡ Equity Rule No. 46; and see Walden v. Bodley, 14 Peters, 160; Snead v. McCoull, 12 Howard, 422.

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Even if it were urged that the defendants did litigate the patent No. 3665 on its merits, and were not prejudiced by the amendment, the answer is that the record shows no such state of facts. All the proofs taken by the defendants applied to the reissue No. 3444.

The defendants were not required to object to the introduction of reissue No. 3665. By their answer they required the plaintiffs to prove their title to reissue No. 3444, and when the plaintiffs put in evidence the reissue No. 3665, it proved the defendants' case for them, because it recited on its face that reissue No. 3444 had been *surrendered.*

Mr. Justice STRONG delivered the opinion of the court.

We think that the order of the court directing that the record be amended by inserting in the bill an averment of the second reissue was properly made, under the circumstances of the case, though made after the final decree. For practically the rights of the complainants under the second reissue, and the defendants' infringement thereof were in issue under the answer and the replication. The amendment deprived the defendants of no rights which they had not enjoyed during all the progress of the trial. It may well be denominated only an amendment of form, because it introduced no other cause of action than that which had been tried. It is true that an amendment which changes the character of the bill ought not generally to be allowed after a case has been set for a hearing, and still less after it has been heard. The reason is that the answer may become inapplicable if such an amendment be permitted. But in this case the defendants were not prejudiced. They had every advantage they could have had, if the bill had originally averred the second reissue. The case is undoubtedly anomalous, but we think justice would not be subserved by denying to the Circuit Court the power to order such an amendment as was made, after the cause was tried precisely as it must have been tried if the bill had originally contained the averment inserted by the amendment.

We come then to the errors assigned by the complainants.

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They relate to the estimate of profits reported by the master and confirmed by the court. The defendants were vendors of musical instruments, including organs and melodeons, which they purchased from the manufacturers. Some of these instruments contained the tremolo attachment, and others did not. For those containing such attachments they paid an additional price and they sold them also for an increased price. In the ascertainment of the profits made by them from the sales, they were allowed to prove the general expenses of their business incurred in effecting the sales of all musical instruments, and deduct a ratable proportion from the profits made by the sale of tremolo attachments. It is of this allowance the complainants now complain. It is said the patent infringed was not for the tremolo itself, but for the combination of the organ and tremolo, and it is argued that if the defendants obtained an extra price for the organ combined with the tremolo without incurring any additional expense, the whole of that extra price was obtained from the addition of the combination. And it is further insisted that the true rule in cases like the present is that if the infringing device is an integral part of the whole instrument, without which it is incapable of use, and for which a single charge is made, then in ascertaining profits on a part of the organization general expenses are to be apportioned according to the cost, or by some other equitable rule. But when the infringing device is an optional one, used or not at pleasure, and an extra price is charged and received for it when used, the true profit made is the extra sum received for the addition, deducting only such expenses as are incurred by reason of the addition. We think such a rule, even if it may sometimes be just, is inapplicable to the present case. We cannot see why the general expenses incurred by the defendants in carrying on their business, such expenses as store rent, clerk hire, fuel, gas, porterage, &c., do not concern one part of their business as much as another. It may be said that the selling a tremolo attachment did not add to their expenses, and therefore that no part of those expenses should be deducted from the price obtained for

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such an attachment. This is, however, but a partial view. The store rent, the clerk hire, &c., may, it is true, have been the same, if that single attachment had never been bought or sold. So it is true that the general expenses of their business would have been the same, if instead of buying and selling one hundred organs, they had bought and sold only ninety-nine. But will it be contended that because buying and selling an additional organ involved no increase of the general expenses, the price obtained for that organ above the price paid was all profit? Can any part of the whole number sold be singled out as justly chargeable with all the expenses of the business? Assuredly no. The organ with a tremolo attachment is a single piece of mechanism, though composed of many parts. It was bought and sold as a whole by the defendants. It may be said the general expenses of the business would have been the same if any one of these parts had been absent from the instrument sold. If, therefore, in estimating profits, every part is not chargeable with a proportionate share of the expenses, no part can be. But such a result would be an injustice that no one would defend. We think it very plain, therefore, that there was no error in the rule adopted for the ascertainment of the profits made by the defendants out of their infringement of the complainants' patent.

We think also the master's report, confirmed by the court, was correct in its ascertainment of the general expenses. At least there is nothing before us to show that it did not conform to the second decretal order. The defendants submitted analyses of their books, from which it is to be presumed the master distinguished general from particular expenses.

It follows that neither the appeal of the defendants nor the cross appeal of the complainants can be sustained.

DECREE AFFIRMED; the costs of each appeal to be paid by the appellants.

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Syllabus.

COLLAR COMPANY v. VAN DUSEN.

1. The purpose of a reissue is to render effectual the actual invention for which the original patent should have been granted, not to introduce new features.

   Therefore, in an application for reissue parol testimony is not admissible to enlarge the scope of the invention beyond what was described, suggested, or substantially indicated in the original specification, drawings, or Patent Office model.

2. Whether a reissued patent is for the same invention as the original, depends upon whether the specification and drawings of the reissued patent are substantially the same as those of the original; and, if not, whether the omissions or additions are or are not greater than the law allows to cure the defect of the original.

3. Where the original patent for improvement in paper shirt-collars, granted to Andrew Evans, May 26th, 1868, stated the invention to consist, first, in making the collars of parchment-paper, or paper prepared with animal-sizing; and second, in coating one or both sides of the collar with a thin varnish of bleached shellac, to give smoothness, strength, and stiffness, and to repel moisture; the claim being for "a shirt-collar made of parchment-paper, and coated with varnish of bleached shellac, substantially as described, and for the objects specified:" *Held*, that a reissue thereof which describes a paper other than parchment-paper, or one prepared with animal sizing, and which does not require either side of the collars to be coated with a varnish of bleached shellac for any purpose, the claim being for "a collar made of long-fibre paper, substantially such as is above described," is for a different invention from that embodied in the original patent.

4. Articles of manufacture may be new in the commercial sense when they are not new in the sense of the patent law.

5. New articles of commerce are not patentable as new manufactures unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture.

6. It appearing that the collars made by Evans, apart from the paper composing them, were identical in form, structure, and arrangement with collars previously made of linen paper of different quality, and of other fabrics, and that Evans did not invent the special paper used by him, nor the process by which it was obtained: *Held*, that he was not entitled to a patent for the collars as a new manufacture.

7. The relations of an employer and a party employed by him, in regard to the origin of inventions, stated.

8. The object in turning down a collar on a curved line instead of a straight line is precisely the same, whether the collar be all paper, paper and linen, or all linen. Hence, where it appeared that linen collars had

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Statement of the case.

been turned over on a curved line, to prevent wrinkling, and to afford space for the cravat: *Held*, that it was not patentable to apply the same mode of turning down to collars of paper or paper and linen.

Reissued patent of Andrew Evans, for "improvement in paper shirt-collars," July 10th, 1866 (original May 26th, 1863), and of Solomon Gray, "for improvement in turnover shirt collars," March 29th, 1864 (original June 23d, 1863), pronounced invalid.

APPEAL from the Circuit Court for the Southern District of New York, in which court the Union Paper-collar Company filed a bill against Van Dusen, to enjoin him from making shirt-collars out of a certain sort of paper which he was using and to which they claimed an exclusive right, and also from turning over the collars so made, by a particular contrivance which he was also using, and of which, as of the fabric of the collar, the company claimed a monopoly.

The claim by the company of exclusive right as to the fabric of the collars—that is to say, the sort of paper out of which they were made—was founded on a grant to them of a patent, reissued to one Andrew Evans; the claim of similar right as to the device by which the collar was turned over, was founded on the grant to them of a patent reissued to a certain Solomon Gray.

Van Dusen, admitting the use both of the special sort of paper and of the device for turning the collars over, set up:

I. AS TO THE EVANS PATENT, THE ONE, NAMELY, FOR THE FABRIC—

1. That the reissue to Evans was void, as not being for the same invention as the original patent.

2. That, whether or not, both original and reissue were void for want of novelty.

II. AS TO THE GRAY PATENT, THE ONE, NAMELY, FOR THE DEVICE—

1. That it too was void for want of novelty.

The reader will, of course, remember that the Patent Act authorizes the issue of a patent only when a person has invented or discovered some "*new manufacture*, or some new and useful improvement thereof, not known or used by others;" and also that while authorizing in certain cases the reissue with an amended specification of an original

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patent, where the specification has been defective, the act contemplates that the reissued patent shall secure no other than "the same invention" meant to have been secured by the original.*

The case was thus:

I. *As to the Evans patent and reissue, the fabric for making shirt-collars.* Paper being made out of linen, among other things, and some sorts of paper being more stiff or more tough than others, it had been observed long prior to the grant of any patent on the subject, that shirt-collars could be made out of the stiffer or more tough sort of papers, and that the collars, if used but for a short time and not closely looked at, might pass for linen collars. A man named Olmstead, the "property-man" of a band of negro minstrels, who used to costume themselves in fantastic style, had used them so far back as 1851 to dress his minstrels when performing at a place called "White's Varieties," in the Bowery, New York. He said:

"In the year mentioned, and afterwards, we made wooden blocks or patterns from linen collars, and laid the blocks on paper. We would then mark the paper with a lead-pencil, and afterwards cut out the collar from the paper by the marks, with a pair of scissors. For stiff or 'stand-up' collars of large size and fantastic shape—such as we used when we wanted collars with long points and to come up nearly to the men's eyes—we used Bristol boards, such as artists use. The outside of that board is glossy. The other side, which is not glossy, the performer put next his face. The gloss prevented the burnt cork, with which the so-called negro minstrels (who are all white men) are blackened, from sticking to the paper. Turned-down collars we made out of paper. We did this by simply pinning the paper to a cravat and then laying it on a board and turning it over the cravat. Sometimes these collars were cut in two at the back; that is to say were made out of two pieces of paper. When we wanted fancy collars we would prick the Bristol board or paper. The holes looked like stitches. Sometimes we would paint them pink or blue, or in stripes, so as to be like

* Revised Statutes of the United States, §§ 4885, 4916.

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Statement of the case.—Evans's patent; that for the fabric.

colored linen or linen, with blue or pink stripes. The fancy collars were worn, of course, only on the stage. But the white ones, our men—who as a class are lazy fellows—would sometimes wear in the street. On the stage we could, with care, wear the collars several times. In the street, only once or twice. We got the Bristol boards and paper out of which we made these collars at Rayner's, a stationer, in the Bowery. I sold these collars for eight or nine years, and from two to five cents. I did not go regularly into the business because I had no capital."

Subsequently a person named Hunt made a business of selling paper-collars, and got a patent for the particular sort which he made. This sort was made out of paper applied to some woven fabric, the paper, which was worn on the outside, giving to the loose and limber fabric of the woven fabric rigidity, and the general appearance of a starched linen collar, while the woven fabric, worn next the skin, sustained and gave strength to the paper. Nevertheless, these collars were expensive and had a harsh and inelegant look. In addition, they wanted pliability, and when turned over were apt to crack and form a roughened edge.

However, as already said, paper had long been made having different degrees of toughness. Some paper—"short-fibre paper," as it is called, the sort commonly used for the inferior class of newspapers—paper made from wood, or from poor cotton rags ("soft stock," as it is called) or from old paper itself, or by imperfect processes—is brittle, and tears easily. But another sort, "long-fibre paper," that made from linen rags, or linen canvas, manila rope, Kentucky bagging, &c. ("hard stock," as it is called), and from which, by some variation in the machinery producing it, and with more time, are produced the papers known as bank-note paper, cartridge-paper, silk-paper, and tissue-paper, among the thin papers, and parchment-paper, drawing-paper, and Bristol boards, among the thick, is highly tenacious and some of it quite pliable.

A reference to the general features of the process of paper-making by mechanical means will assist comprehension of subsequent parts of the case.

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After the "stock"—best rags or what else—is sorted and cut, it is generally cleaned by boiling, and finally put, with the requisite quantity of water, into the "beating engine," where it is beaten or ground into pulp. The beating engine is simply a vat divided into two compartments by a longitudinal partition, which, however, leaves an opening at either end. In one compartment a cylinder revolves, called the "roll," its longitudinal axis being at right angles to the length of the vat. In this cylinder, and parallel with its axis, are inserted a number of blades or knives which project from its circumference. Directly beneath the roll, upon the bottom of the vat, is a horizontal plate, called the bed-plate, which consists of several bars or knives, similar and parallel to those of the roll, bolted together. The roll is so arranged that it can be raised or lowered, and also the speed of its revolutions regulated at pleasure. The vat being filled with rags and water, in due proportion, the mass is carried beneath the roll, and between that and the bed-plate, and passing round through the other compartment of the vat, again passes between the bed-plate and roll, and so continues to revolve until the whole is beaten into pulp of the requisite fineness and character for the paper for which it is intended. When the beating first begins, the roll is left at some distance from the bed-plate, and is gradually lowered as the rags become more disintegrated and ground up. The management of the beating engine is left to the skill and judgment of the foreman in charge. The knives may be sharp or dull, the roll may be closely pressed upon the bed-plate or slightly elevated, the bars and knives may have the angles which they make with each other altered, so that they either cut off sharply, like the blades of scissors, or tear the rags more slowly as they pass between them. The duration of the beating also varies according to the nature of the pulp, the length of fibre required, the condition of the knives, &c.; and the speed of the revolutions given to the roll is varied in like manner.

After the pulp has been beaten until the foreman judges

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that it is of the right length of fibre and quality for the paper desired, it is drawn off from the engine and first passes through the "screens," a kind of sieve, which removes lumps and impurities. The pulp is then poured out upon the wire-cloth, the water draining through the meshes of the wires, an operation which is aided by "suction-boxes" that exhaust the air and suck the water out of the pulp. The thickness of the paper is mainly regulated by the amount of pulp poured out upon the wire, it being kept from flowing over the edge by raised guards. The pulp is carried by the motion of the wire beneath a succession of rollers, the first light and the last heavier, until a heavy roller covered with felt carries it off the wire by its adhering to the felt, and it then passes through heated rollers until it comes out pressed into paper. It is finished by passing under calender rolls, and given more or less gloss as may be required. It is usually sized and colored in the vat before the pulp is beaten. A white color is obtained by bleaching the rags, selecting white rags if possible for the original stock, taking pains to use clear water, and adding blue coloring matter if a yellowish-white is not desired.

There seemed to be no essential difference in the principles on which the two sorts of paper—short fibre and hard fibre—were made. The "stocks," as already said, were different. The machines using them, however, had no mechanical principles different for the two sorts of paper. For long-fibre paper the knives used in the process of pulping must be dull, and the process of beating must be long—forty-four hours being commonly given. For the short-fibre paper, the knives may be dull and the process of beating may be short—four hours suffices. To produce a thick paper, the device of doubling the sheet, where the machine is a cylinder machine, has long been resorted to. And, of course, where the paper is thick and of long fibre, it yields the water in it less readily than when it is thin and of short fibre, and more power must be brought on the pulp in order to expel the water. In the Fourdrinier machine—where the principle of suction is used—stronger

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suction, it need hardly be said, is required to extract the water in the case of the thick paper than of the other.

The matter of coloring is, of course, a matter of taste.

In all parts of the subject, however, there is great room for skill; the thicker, more tenacious, and more sightly paper being produced in different degrees of excellence according as the proper "stock" is used, as the paper-making machines are good, and as they are scientifically used. And as the demand for the thicker and more tenacious and pliable papers is comparatively limited, and the manufacture of each of its branches, to some degree a special business, there are much fewer machines for making it, and much fewer makers of it than there are machines for making ordinary paper and makers of *it*.

Without any effort, therefore, to obtain or to produce a paper other than that already known and in use, Evans, who was not a paper-maker at all, on the 15th of May, 1863, got an original patent for an "Improvement in Shirt-collars." His specification said:

"The nature of my invention consists—

"*First*. In making shirt-collars of a fabric known to the trade as 'parchment-paper,' or paper prepared with animal sizing, which may be manufactured cheaper than a fabric composed of paper and cloth, is sufficiently tough and strong to form tenacious button-holes, is susceptible of a smoother surface and polish than cloth-paper, and can be turned over without cracking and forming a roughened edge, &c.

"*Second*. In coating one side or both sides of paper shirt-collars with a thin varnish of 'bleached shellac,' which not only adds smoothness, strength, and stiffness to the fabric, but also being a repellent of water, prevents perspiration or other moisture from entering the collar. The shellac, moreover, renders the surface of the paper so hard and smooth that it wears much longer without being soiled by exposure to dust or damp. I make my collars of any of the patterns or shapes in general use, either 'stand-up,' or 'turn-over,' and provided with button-holes, by means of which they are attached to shirts in the usual manner.

"I first take the 'parchment-paper,' or paper prepared with

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animal sizing, and cover one side or both sides of it with thin varnish of 'bleached shellac,' and allow it to dry. The paper is then passed between polishing rollers, such as are in general use for polishing paper or cloth. And this operation finishes the fabric ready to be made into collars. The collars are cut out and the button-holes punched by dies with great rapidity.

"My invention constitutes, I think, a great improvement in the art of making shirt-collars, producing a cheaper and better article of its kind than any known or used before.

"Having thus described the nature and operation of my improvement, what I claim as new, and desire to secure by letters-patent, is—

"A shirt-collar *made of parchment-paper and coated with varnish of bleached shellac*, substantially as described and for the objects specified."

These collars made of parchment-paper coated with varnish of bleached shellac, were however open to objections. They did not look at any time very much like starched linen, became discolored after a little time, and showed plainly that they were not linen. The moisture of the skin coming against the sizing caused them to emit an odor not pleasant. Moreover the "Byron" or turned-down collar was now coming into vogue, and the parchment-paper with its coating of shellac answered even less well for it than it did for the stiff or stand-up collar.

Evans now put himself into communication with different paper-makers, to get a sort of paper better suited for *his* purposes than any of the different sorts previously made; something which while it was paper and could be produced cheaply should yet have such a thickness, tenacity, pliability united with strength, and have moreover that polish of surface, and that exact bluish tint which is found in the best starched linen—as distinguished from yellowness and from dead white—which would deceive even critical observers who had no opportunity of judging otherwise than by the eye. No such exact variety of paper had yet been made, nor, so far as appeared, had been attempted to be made. He went to numerous paper mills. He conferred with numerous paper-makers. He spent much money. He made

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many suggestions. The manufacturers studied the matter carefully; got the exact sort of "hard stock" that they thought would produce the special sort of paper that he wanted—and to which, in advance of its coming forth, they gave the name of "collar-paper"—made certain alterations in the machinery of their mills, and went to work; some producing their "failures," and some their approximations in close degree to what he wanted. Evans would sometimes come to the mills, "and had a great deal to say."

The following extract from one or two of his letters illustrates what sort of instruction he was constantly giving. To one manufacturer, in acknowledging the receipt of some paper, he says:

"The paper as regards color is all right. It is not, however, *thick* enough to make the stand-up collar. It will answer for the turn-over collar. I have now on hand stock enough that you have sent me to make 40,000 collars; but it is only suitable for the turn-over collar. I am very much in want of some thicker stock to make a stand-up collar. You don't seem to understand by my letters just what I want; and yet I try to explain explicitly for your information. What I wish you would do is for you to come to Boston and see my place of business, *and let us have a good substantial talk over the matter. It will take only one day, and then I can explain to you just what I want.* I want to show you what I have on hand, and show you *by comparison* what I want for an alteration. If you cannot come, or do not think it advisable to do so, please write me by return mail; and then I will send another order, and take the chance of its being right. I have not, however, had any stock right to cut one style of collar which is very much wanted—the stand-up collar."

In another letter he says:

"I want the paper of the style marked A.S., the hard finish, so that it may be strong. The color of the last two lots was just right. You need not make any variation as to color. It was perfect. Only give the paper to me thicker. Do not make the quantities of each lot too large, for fear they will not be just right. I was sorry not to see you in Boston. I could explain to you much better by seeing you than by writing. Just please

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see if you understand me this time. It is so difficult for me to explain by letter. I wish I could see you."

In a third he says:

"I am not positive that what you make will be *just* what I want when finished. Instead of seven hundred pounds of each size, I wish that you would not make more than two hundred pounds of each, that I may see if it is just right. This is still an experiment, and I have already lost considerable money in experimenting in my paper. Could I but see you one half-hour at my place, to explain to you, and show you by comparison there would be no doubt in the mind of either of us whats wanted. Don't be discouraged. They like my collar as it is; but I am going to have it more perfect. I want some stock heavy enough, thick enough, strong enough, handsome enough, to make my stand-up collar; but I want it just right, before you make me up too large a quantity."

At last Evans got just the paper that he wanted.

In this state of facts, he assigned his patent to the Union Paper Collar Company, and they applied for and got a reissue.

The reissue like the original patent was for an "improvement in paper shirt-collars," and ran thus:

"Be it known that Andrew Evans, of Boston, &c., did invent a new and useful improvement in shirt-collars, and that the following is a full, clear, and exact description of the same.

"Previous to the invention of the said Evans, collars were made of paper applied to some woven fabric, the paper serving the purpose of giving to the loose and limber fabric the body, rigidity, or stiffness, and general appearance of a starched linen collar, while the backing of cloth or fabric gave it the necessary strength or resistance. The increasing cost of the backing and the difficulty attending the manufacture, render the collars intended to be worn, as a general thing but once, too expensive to answer the purpose they were designed for. The object of the said Evans was, therefore, to make a paper-collar in which the cloth-backing may be dispensed with, and which he did, as follows:

"Said Evans discovered, as the result of many experiments, that in order to produce a really good collar, the paper must pos-

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sess the following qualities, viz., strength to withstand the usual wear and tear, particularly where button-holes are used, without excessive thickness, such as to destroy the resemblance to a starched linen collar, and tenacity or toughness, with pliability sufficient to allow the collar to be folded upon itself without cracking at the fold, and the pureness of color and necessary polish to make it resemble starched linen.

"He made his collars out of a paper which he produced, or caused to be produced, in which he combined these qualities; which paper was made of a long fibre, substantially, in this respect, like banknote-paper, but of about the same thickness as that of an ordinary collar, and of a pure shade or color, such as to resemble starched linen.

"By means of the length of fibre in the material, he was enabled to obtain, from the degree of thickness above specified, a sufficient degree of strength, tenacity, and pliability to make a collar practically useful for wear, without interfering with the resemblance in appearance to a linen collar. *A sample of the paper which he thus found suitable and used, is shown, filed with the original application of the said Evans for his patent, above referred to.*

"To produce a paper having the above-mentioned qualities, what is known as 'hard stock' should be used in larger proportion than is required for other descriptions of paper, except for that which is known as banknote-paper, and in the process of pulping the stock dull knives should be used, and the distance of the knives or beaters, and their mode of striking the knife-bar, should be so arranged as to draw out the pulp instead of chopping it short, constituting what is known as the 'long-beating' process; and this long beating should be continued for a great length of time, so that the fibre shall be not only long but fine, and thereby the paper not only be more strong, but more smooth and even, and the fibre become bedded in the thickness of the paper so as not to mar the surface.

"After the stock is thus pulped, the paper, if made upon a cylinder machine, may be run off in two or more sheets of pulp, which may be united, as they run from several cylinders—and pass together, one over the other, under the press or rolls—into one sheet of the required thickness; or one sheet may be first run off upon a reel, and then united in the same manner with another sheet running from the cylinder, and both passing under

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the rolls together; but the former mode is found preferable in practice, as the several sheets are in that case of equal degrees of moisture, and therefore form in that state a more perfect union. In case a single sheet is used, made upon a cylinder machine, as its thickness and length of fibre tend to retain the moisture, great care must be taken to expel the water from the pulp.

"In case a Fourdrinier machine is used, the paper may be made of the required thickness from a single sheet of pulp; but the 'wire' on which the pulp is formed should be supplied with extra suction-boxes to remove the water, and its forward motion should be much slower than in the manufacture of ordinary paper, whilst the lateral or vibratory motion of the wire should be as rapid or more rapid than usual, in order to afford greater time and motion for extracting the moisture from the pulp.

"Care should also be used to give to the paper in the pulp the slight bluish tinge which is found in starched linen, and to prevent its having a dead or yellowish-white color.

"The invention of said Evans is not confined to the use of any specific proportion of 'hard stock,' nor to any specific time or mode of 'long beating' of the pulp, nor any specific method of running off or uniting the sheets of pulp, or of exhausting the moisture, or of giving the required tint; but it is believed that the quality of stock to be used, the process by which the length of fibre and the required shade of color are produced, will be readily understood by paper manufacturers, having regard to the above description and the purposes for which the paper is designed.

"This paper *may* be prepared with animal sizing, and when so prepared it is known in the trade as parchment-paper, or such sizing may be dispensed with.

"The paper *may* also be covered on one or both sides with a thin varnish of bleached shellac, and allowed to dry; or such varnishing may be dispensed with. The paper, having been passed between polishing rollers such as are in general use for polishing paper or cloth, is ready to be made into collars.

"The collars are cut out, and the button-holes, if any, are punched by dies; and the collar may be indented along a line running parallel with the exposed edges, so as to imitate the stitching of sewed collars, and of such various patterns or shape as are in use, either 'stand-up' or 'turn-over;' and provided, if

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required, with button-holes, by means of which they might be attached to shirts in the usual manner.

"What is claimed under this patent is the invention of the said Evans, and desired to be secured by letters-patent, as a new article of manufacture, is—

"A collar made of *long-fibre paper*, substantially such as is above described."

As to whether the manufacture of collar-paper was a novelty, the evidence was contradictory. Mr. Crane, the manufacturer of it and a person long established in the business of paper-making, said:

"It was at that time a new manufacture. We never heard of it before. We had heard of the paper and cloth collar, but never of collar-paper made expressly for collars before. I can't recall any paper it resembles, except Bristol board; and this is an entirely different thing, when you come to examine it. I have often thought it over. If I have found paper as thick as that, it lacked either the color, the strength, or the flexibility. I have found paper that separately possessed the various qualities which are combined in that; thus a sheet of banknote-paper would possess its strength and flexibility; a sheet of writing-paper would possess its whiteness and smoothness; a sheet of pasteboard its thickness. It was from six to twelve months from the time we began our experiments before we succeeded in making collar-paper such as was satisfactory."

Other witnesses supported this view, one of them stating that "a collar-paper, when first shown, was looked on by him as a marvel in paper-making;" and others stating that the use of collar-paper had been followed by the application of paper to uses radically different from those previously known; paper stronger, thicker, and more flexible than any before made.

But this view of novelty was contradicted by numerous experts of the defendant. The testimony, for example, of one Derrickson, a paper manufacturer of New York, who became an apprentice to the paper-making business in 1823, and had made it his business more or less ever since, will

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serve for an example of nearly what they all swore. He said:

"I have seen paper like this paper, called collar-paper, made twenty-five years ago. There is no difference in it from other papers, more than it is made in a double cylinder and is double; the same as any other heavy paper is. It is strong; and, generally speaking, the heavier the paper is the stronger it is also. I have seen better paper than the complainant's collar-paper made at Pennypack, Pennsylvania, when I was an apprentice. It was called thick writing-paper, and was used for ledgers. There is no quality of toughness, capacity of being turned without cracking, or thickness, which makes the collar-paper *substantially* different, so far as I see, from the qualities of other papers long in use in this country. Long-fibre paper has been a common article of manufacture in the United States longer than I can remember. It has been known in the market as bank-note, bond-paper, cartridge-paper, drawing-paper, silk-paper, tissue, manillas, and tissue-paper.

"There is no essential difference in the process and means used to produce collar-paper, that I know of, and the process and means employed to produce other thick, strong, pliable long-fibre papers which I have enumerated. The same machinery answers for one as the other. No difference in stock or in the essential manner of treating it. The specification in the reissue of Evans's patent gives me no new information as to paper-making."

Numerous witnesses supported and amplified this view.

So much for the Evans part of the case; the part relating to the fabric. Now, as to the Gray part of it; the reissue for turning the collar over. This reissue was granted June 23d, 1863, and was thus:

"Be it known that I, Solomon Gray, of Boston, &c., have invented certain new and useful improvements in turn-over shirt collars; and I do hereby declare the following to be a full, clear, and exact description of the same, reference being had to the accompanying drawings making a part of this specification, in which—

"Figure 1 (on page 545) represents the outline of the collar

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before it is turned over, with lines dotted thereon to illustrate the mode of folding it over, and the effect produced thereby.

"Figure 2 (on page 546) represents a perspective view of the same, turned over and brought into a circular form, as it would be on a person's neck. The same letters indicate like parts in both drawings.

"In the making of turn-over shirt collars of paper or of cloth and paper combined, it is exceedingly difficult to fold the material so that, when turned over on the arc of a circle it will present a regular line; this cannot be done by the eye, but must be done by a gauged line made in the material, or by a former of suitable shape laid on the material as a guide to turn it over by.

"The first part of my invention consists in turning over the collar by a line pressed into the material by a die or by drawing a pointed instrument over it beside a pattern, and then following the indented line, or by turning it over the edge of the pattern or block of the proper curve or line.

"Another defect or difficulty in turn-over collars made of paper, or of paper and cloth combined, consists in the wrinkling or puckering of the inner part when brought into a circular form, as it is when on the neck of the wearer, and which is occasioned by the inner part, of necessity, occupying a smaller circle than the outer part.

"The second part of my invention consists in turning the collar over in a curved line, or in a series of straight lines and straight angles, by which means the wrinkling or puckering is entirely obviated. In a paper, or a cloth and paper combined, collar, if turned over on a straight line, in addition to the wrinkling and puckering, there is another objection, viz., the difficulty of inserting a neck-tie underneath the turned down portion and the band, and when inserted it increases the tendency of the inside to wrinkle and pucker. But, by turning over the collar on a curved line, or on a series of straight lines that elongate the line by which it is turned over, there is a space formed between the turned down portion and the band portion in which the neck-tie can be laid without the least tendency to wrinkle or pucker.

"The third part of my invention consists in so turning over a collar made of paper, or of paper and cloth combined, on a curved or arched line, as that a space shall be left between the

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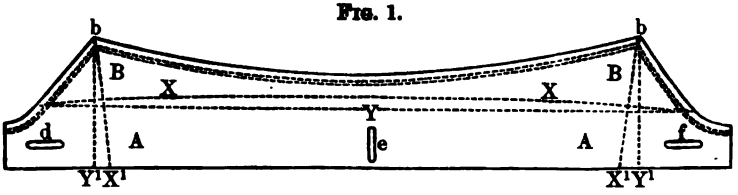
turned over portion and the band portion, which space may be occupied by a neck-tie of any ordinary description.

"To enable others skilled in the art to make and use my invention, I will proceed to describe the same with reference to the drawings.

"My invention is not confined to any particular style of turn-over collars, but I regard it as more particularly applicable to collars made of paper or of paper and cloth combined.

FIG. 1.



"Hitherto collars have been turned over in a straight line, as represented by the dotted lines, *Y*, in Fig. 1; and the practical objection to all such collars has been mentioned above. The line *X*, however, as will be seen in said Fig. 1, is an arc of a circle; and on this line the part *B* is turned over on to the part *A*. The best mode of doing this is to make in the collar an impression of the curve or line on which it is to be turned over, either by means of a die pressed upon it or by drawing a pointed instrument over it beside or along a pattern. When this is done, the collar can be readily turned over on or following the indented line. Or the collar may be turned over the edge of a pattern or block of the proper curve or line. The line *X*, instead of being in a curve or arc of a circle, might be composed of a series of straight lines, with an angle at the centre of the collar, and accomplish the desired object about as well.

"I prefer, however, to make the folding-line on the arc of a circle. In turning the collar over on a curved line, as at *X*, instead of a straight line, as at *Y*, the corners *b b* of the turn-over part *B* will be over the points X^1 X^1, instead of the points Y^1 Y^1, where a straight line would bring them; by which it is evident that the longer space, from Y^1 to Y^1 (*i. e.*, from *b* to *b*), has only to cover the shorter space from X^1 to X^1 on the part *A*, forming the inner circle, and thus the inner circle will not be wrinkled or puckered by the tension of the outer one. Besides, by turning the collar on a curved line, so far from the outer portion crowding upon the inner portion and thus wrinkling it, the por-

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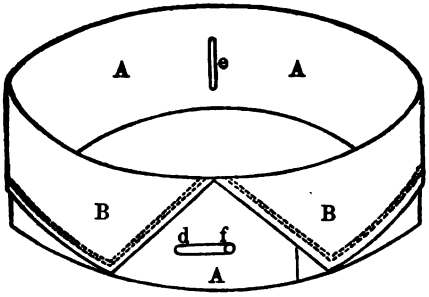
tion *B* will actually stand off from the portion *A*, a distance corresponding somewhat to the space shown between the lines *b Y*¹ and *b X*¹, and varying only with the extent of curvature of said folding or turn-over line.

FIG. 2.



"This space between the two portions, *A B*, when the folding over is done, is available for a neck-tie, if one be worn; but the space itself prevents the two parts from pressing against each other, which pressing tends to wrinkle one or the other. *d*, *e*, and *f*, represent the button-holes, which are punched in the material in the usual way.

"The drawings are about the size of a medium collar, and the greatest distance from the straight line *Y* to the curved line *X* is about one-fourth of an inch; it may, however, be more or less, and still accomplish the object required. Collars thus constructed never wrinkle nor pucker, and may even be rolled up into a circle of not more than an inch or so in diameter (as is often convenient for transportation) without the slightest injury; as the difference in length of the outer and inner portions, and the fact that the outer portion stands off from the inner portion so as to leave clear space between them, admits of such rolling.

"Having thus fully described my invention, what I claim therein as new and desire to secure by letters-patent is—

"First. The turning over of a paper or a paper and cloth collar by a defined line, whether pressed into the material by a die or pointed instrument, or by bending it over the edge of a pattern or block of the proper curve or line, substantially as described.

"I also claim turning the part *B*, of a paper or a paper and cloth collar, over on to or towards the part *A*, in a curved or

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angular line instead of a straight line, substantially as and for the purpose described.

"I also claim so turning over the part *B*, on to or towards the part *A*, in the manner above described, as that a space shall be left between the two parts, for the purpose and substantially in the manner herein described."

As to the first of these claims—which covers a defined line, whether straight or curved, made by the means indicated, either pressing a die or pointed instrument into the material to make the line, or making the line by bending the material over the edge of a pattern or block representing the desired line—the testimony of several witnesses showed,

That anterior to the date of the patent, paper envelopes, the tops and bottoms of paper boxes, and similar articles requiring folds, were shaped or folded by placing the material upon a lead or other soft platten, and making the impression of the required shape or fold, by bringing down upon it a steel "knife" and applying pressure, thus producing an indented or defined line, which the fold must follow.

That the same method was also employed in paper-folding machinery, and the folding and cutting of writing-papers.

That the method so employed for marking the folds of envelopes was the same as that subsequently employed by an Italian named Karcheski, to make the folds of paper collars.

That linen collars, cut with band and top all in one, without seam where the band joins the top, were folded by means of an indented line, anterior to the patent.

That these collars were turned down or folded in the process of ironing: "ironed on blocks with a groove in the block, and the iron passing in this groove, the collar would receive the indenture to turn down on."

It was also proved that before the patent, paper collars and paper and cloth collars had been turned over by such defined line pressed into the material, or by bending over the edge of a block or former.

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As to the second claim which covered the turning over of the collar in a curved or angular line, whether by a defined line or not, and by whatever means, it was proved, and indeed was not denied, that *linen* collars had, from a date long anterior to Gray's alleged invention, been turned over, on a curved instead of a straight line, and that they had been so turned over "substantially for the purpose described" in the patent, viz., to avoid wrinkling or puckering, and to afford a space for the cravat.

It was shown that a common way of turning down linen collars on such curved line, and a way familiar to all who wear those collars, is to follow the line of the seam where the band joins the top. The band being commonly cut upon an arch or curve upon the upper side, the seam consequently makes a curved line, which is followed as a gauge in making the fold.

It is also proved by the witnesses, that paper collars had, before Gray's application, been turned or folded upon a curve by methods the same as that described by Gray.

The third claim was considered by the witnesses the same as the second; and their testimony applied to it accordingly.

The court below found,

I. That Evans's reissue was void as not being for the same invention as the original. It also considered that Evans was not the inventor of the product patented by him.

II. That Gray's reissue was also void; his invention having been anticipated.

From a decree accordingly this appeal was taken.

Mr. C. A. Seward (with whom was Mr. C. C. Morgan), for the appellant:

I. As to the EVANS patent.

We assume,—for the reason that it was the identical paper in the form of a collar that was embraced in both the original and in the reissued patents—that there was no such plain repugnancy between the original and the reissue as to make it necessary to be held, as matter of legal construction, that

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the new patent was not for the same invention as that embraced and secured in the original invention. With this assumption, one rightly made we submit—we safely argue—

1*st.* That the collar-paper was a new and patentable invention.

2*d.* That Evans was the person who in truth invented it.

1st. *No such paper as collar-paper had ever been thought of before the time when it was now thought of.*

That paper resembled no paper ever previously made. It was not like bank-note or cartridge-paper, bond-paper, or parchment-paper, or Bristol boards, or any other long-fibre paper. It was a union of the known elements of paper, a treatment of them by a new combination of old processes, and a giving to them when united a new application, resulting in the production for the first time of a paper—as we call it, though it might have been called by any new name—which could be practically and successfully used in the manufacture of collars, and which was not applicable to any other use to which paper is applied. It was "a new combination of old materials constituting a new result or production," and so within the Lord Chief Justice Abbot's definition,* a new and useful "composition of matter, having qualities possessed by no other known material," and so within the definition of Grier, J.,† and of other judges.‡

Indeed it is proved by the evidence that so much was this "collar-paper" an invention—such "a marvel" was it in paper-making—that it opened at once a new field for inventive effort, by directing attention to the practicability of making papers of such strength, thickness, and pliability as would render them suitable for uses radically different from any to which paper had been formerly applied. The invention of collar-paper, we may here mention, in illustration of this statement and as a fact which will hardly be disputed by the candid counsel opposing, was followed by the inven

* Quoted in Curtis on Patents, § 27, note 2.

† Goodyear v. The Rubber Company, 2 Wallace, Jr., 356.

‡ See Many v. Jagger, 1 Blatchford, 372; Munts v. Foster, 2 Webster's Patent Cases, 96.

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tion, in 1864, of paper hats—greatly superior to the old Navarino hats, and now extensively worn—in 1867, of paper belting for machinery—as tough as sole-leather—in 1868, of paper boats—especially prized for their lightness and consequent fitness for hunting skiffs and for use in rowing matches; also of paper vessels for petroleum and other volatile liquids, impermeable to gases and stronger and less liable to corrode than those of tin; in 1869, of paper horse-collars, largely used in work-harnesses, especially in the warmer parts of the South; inventions, indeed, which are but the pioneers of a whole class of inventions in paper now widely used and highly esteemed.

2d. *It was to Evans that the credit of this invention was due.*

Although Crane & Co. were skilful paper-makers, and especially versed in the manufacture of long-fibre papers, it is evident that until Evans began to give his directions, neither they nor any one else had conceived of such a paper as that now known as "collar-paper," and *a fortiori* had not conceived of the right modes of making it. Crane & Co. went through a long process of instruction from Evans, and from those instructions the art was obtained. It is thus evident that the conception of the result to be attained originated with Evans alone. *He* was led by investigation and by trials of numerous papers to conceive of such a practicable combination of qualities in paper as would render it suitable for a collar. *He* it was who gave all the directions which were needful to enable Crane & Co., without the exercise of any invention of their own, to effect the desired combination.

Evans's conception therefore was not a mere vague and unintelligent notion that it was possible to make a paper which would answer the purpose, followed by a request to his paper-makers to do it if they could. It was a conception which was the result of a thorough familiarity, acquired by diligent study and research, with the qualities and properties of numerous kinds of paper as respected their fitness in certain particulars for a paper collar; ending in the conviction that it was practicable to combine this quality found in one

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with that quality found in another, and so on, until such a combination was effected as would embrace all the essential requisites.

This novel and useful result was anticipated by his foresight, and was confidently assumed by him as practicable, at a time when no one could say, from any knowledge then existing, that it could be attained. To reach it, he called for a new combination of various methods which had been employed before for the production, in other relationships, of the several qualities he wished to unite. The details of this combination, so far as the essential features which went to make up the invention were concerned, were directly specified by him when he gave Crane & Co. the instructions which he did give.

Evans required of Crane & Co. that they should use their judgment and skill—in obedience to his suggestions or instructions as to what was needful—to effect this combination of qualities. As the inventor, and as a practical collar manufacturer, he took the samples of paper produced and tested them, to see whether the combination presented gave the desired result.

If invention implies a knowledge of defects and the means of remedying them, then all that there is of this invention belongs to Evans. He discovered the defects in all kinds of existing paper. First, as to the color; second, as to thickness, weight, and strength. He suggested the remedy as to both, first as to the color, and second, as to the strength.

As between himself and Crane & Co., Evans was the inventor, and being so had a right to claim the manufacture of paper collars as his invention. If he was not, who was? Was it Crane & Co.? Would any chancellor have enjoined Evans on their bill from making the new product? Surely not. If, as between Crane & Co. and himself, Evans was the inventor, he was the inventor as against the world, for no one but Crane & Co. and Evans were concerned in the efforts to get this paper.

The case is not affected by the fact that the claim of the patent is limited to the use of such paper in the manufacture

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of collars, collars being the only article for which it is suitable. The claim is not for making collars, but for making collars out of *collar-paper*.

That Evans was not a paper-maker is quite unimportant. Many inventors have not been skilled in the art with which their inventions were connected. Evans rightly employed (as other inventors might have done) those who were acquainted with the construction and adjustment of the machinery and working of the materials which were necessary to be used in the production of the invention, and who were skilled in that branch of art to which the invention related. He had a right to use the skill of all kinds of trained operatives to effect his purpose; and just so long as those operatives were employed in contributing to that end, by a modification of material, or a change of process, or a change of treatment, just so long were they endeavoring to produce what Evans had directed them to make, and they were his instruments; the hands with which he worked.*

What Evans was striving to produce, and as he states endeavoring to secure by a patent, was the product, not the process. The product is new, and could not have been made without the original conception and plan of manufacture which Evans originated.

If this product had not required invention, it is incredible to suppose that so many years would have elapsed, and so many other experiments have failed, before it was produced. Some one produced the product. No one ever produced it until Evans gave instructions therefor. No one other than Evans ever pretended to have produced it. The natural conclusion therefore is that Evans was the inventor of the product.

II. As to GRAY'S patent.

The principle of Gray's invention consists in the process of folding a collar of paper or of cloth and paper by making a defined curved line, exactly located or fixed, at or near the

* Pennock v. Dialogue, 4 Washington's Circuit Court, 538; Sparkman v. Higgins, 1 Blatchford's Circuit Court, 205; Blandy v. Griffith, 3 Fisher, 616.

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outset, by being indented into the material with a suitable instrument or broken into it over the edge of a pattern, and turning the collar over on or following this line; whereby certain important advantages in the collar itself may be easily and conveniently secured.

The invention is not described as relating to collars of any and every kind of material. The remark of the patentee, that "my invention is not confined to any particular *style* of turn-over collars," must be understood as relating to the fashion of the collars, and not to the materials of which they are made. Style is contradistinguished from fabric or material.

The *claims* of the patent, moreover, are limited to the application of the invention to collars *of paper or of cloth and paper combined*, the three claims corresponding respectively to the three parts of the invention, as set forth in the foregoing specification. The patent, therefore, has reference solely to collars of these materials.

The utility of the invention, as applied to collars of the given fabric, is stated to be that it permits so folding collars of paper or of cloth and paper on a curve as to avoid the wrinkling or puckering of the bands when the collars are put around the neck, and so folding them on a curve as to leave room enough for a cravat between the turn-over portions and the bands.

The folding, therefore, on a defined indented curved line, is to be regarded as an invention by which it is rendered practicable to secure the advantages just set forth, *in connection with collars of paper, or of cloth and paper combined*, as they had been secured before, in connection with linen collars, by modes of treatment radically different from Gray's and entirely unsuitable for the folding of paper collars.

That the attainment of these advantages in connection with such collars would be impracticable, without the aid of Gray's process of folding, is made obvious by the fact that although these advantages of not crimping and of space for a cravat doubtless had been appreciated for many years in linen collars, none of the collars of paper or of cloth and

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paper made and sold preceding Gray's invention, were folded otherwise than on a straight line.

The second and third parts of the invention are both described as relating to collars *of paper, or of cloth and paper combined.* In the seventh paragraph of the specification, the patentee says: "The second *part* of my invention consists in turning the collar" [that is, the kind of collar previously described—one of paper or of cloth and paper] "over in a curved line, . . . by which means the wrinkling or puckering is entirely obviated." Also, in the same paragraph, he remarks: "The third *part* of my invention consists in so turning over a collar made of paper or of paper and cloth combined, on a curved or arched line, as that a space shall be left . . . which space may be occupied by a neck-tie."

The desirable results thus secured were new and important improvements in collars of these materials.

It will be observed, however, that the second and third parts of the invention are not described as consisting merely in these results, but in *so turning* collars of paper or of cloth and paper combined, on such a curve as to secure these results; the manner of turning or defining the fold having been previously described as a *part* of the invention. But this manner of folding may be practiced without making the curve large enough to afford either of these results. The invention, therefore, does not consist solely in the specified manner of folding; but it consists also in so making the fold, by this process, as to secure in collars of paper, or of cloth and paper combined, the before-mentioned beneficial results previously unknown in such collars.

The second claim of the patent is for "turning the part B of a paper or a paper and cloth collar over on to or towards the part A, in a curved or angular line, substantially as" (that is, in the way before specified, to wit, by Gray's process), "and for the purpose" (*i. e.*, the prevention of wrinkling, previously set forth as the *second part* of the invention) "described."

The third claim is for "so turning over the part B" (of the paper or paper and cloth collar before specified) "on to

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Argument for the appellee.—The Evans patent.

or towards the part A, *in the manner above described*" (*i. e.*, by Gray's process), "as that a space shall be left between the two parts for the purpose and substantially in the manner . . . described."

The patent, therefore, in respect to each and all its claims, must be regarded: (1) with reference to the mode of producing the curved fold; (2) with reference to the character of the fold itself; (3) with reference to the peculiar fabrics (paper or cloth and paper combined) of which the collars are made, and to which the patent is expressly limited.

[The counsel then went on to comment on the policy of the Patent Laws, with regard to disclosure of prior inventions, and to enforce the observations of the court in *Gaylor* v. *Wilder*,* that the prior knowledge and use which would defeat a patent must be "knowledge and use existing in a manner accessible to the public," arguing further on the evidence (as interpreted by the counsel) that there was no public knowledge of any experiment before Gray's patent.]

Mr. J. J. Coombs and Edward Wetmore, contra:

I. *As respects the Evans patent.*

The argument of the other side sets out with an assumption essential to any argument on that side, that the original patent and the reissue are for the same invention. But the assumption is wholly false in fact and law. Whether or not this is so is a matter to be judged of by inspection and comparison, which every one can make of the two instruments. The invention meant to be patented by the original patent was the making of collars of paper prepared with animal sizing. The reissue is for making collars of any kind of paper that is suitable for the purpose, and suitable principally because not prepared with animal sizing. The reissue is thus plainly, palpably, undeniably for an invention radically different from any described or even alluded to in the patent. If this is so the Gray patent falls dead. To stab it further is worse than useless. Nevertheless, it is equally

* 10 Howard, 477.

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void if the assumption of the other side were wholly true instead of being as it is, wholly untrue.

1st. *No "new manufacture" was invented by any one.* Long-fibre paper, which, and which alone, collar paper is, had been long invented. Long-fibre paper in itself was not patentable, and giving to it any particular thickness, polish, or tint by the same means that had been before tried to give to such paper thickness, polish, or tint, could not impart a patentable character to it. Collar paper did at most but combine in a higher degree than they were before combined in paper, certain well-known characteristics of paper. But the combination was produced by old and well-known processes. The production by old and well-known processes of old and well-known characteristics, though in a higher degree than previously known, does not make "a new manufacture," but only a variety of an old one.

2d. *Had any new manufacture been invented, Evans did not invent it.*

Evans simply told Crane & Co. what he wanted; and told them as they brought to him from time to time what they made, that was not what he wanted; telling them this till *they* went on and, by their own processes, made what he did want. Evans suggested no improvements in machinery or in processes. All improvement, if any there was made in either, was made by Crane & Co.

Both these last two positions are capable of being largely unfolded and strongly reasoned. But in view of the first position taken by us, the position, namely, that the reissue is for an invention radically different from that secured by the patent (a position which it is plain *must* be sustained by the court), we forbear. Any further enforcement of them is but "thrice to slay the slain." In a legal argument about a patent, when one plain and absolutely conclusive reason is given why the patent is void, it is unnecessary to assign further reasons. Indeed worse than unnecessary; being in truth but "wasteful and ridiculous excess."

II. As to the GRAY patent, it presents nothing more than

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the double use of a familiar process of folding, and on the case as shown by the evidence is plainly void.

Mr. Justice CLIFFORD delivered the opinion of the court to the following effect.

The case presents two principal questions for decision:

1st. Whether the reissued patent granted to Evans for improvement in paper shirt collars is a valid patent.

2d. Whether the reissued patent originally granted to Gray for improvements in turn-over shirt collars is a valid patent.

Infringement is admitted.

The defendants allege that the reissued patent of Evans is not for the same invention as the original. This, if true, is sufficient to show that the patent is invalid even if the patentee was the original and first inventor of the improvement described in the original patent.

Power to surrender patents for the purpose suggested in the act of Congress implies that the specification may be corrected to the extent necessary to cure the defects and to supply the deficiencies to render the patent operative and valid, but the interpolation of new features, ingredients, or devices which were neither described, suggested, nor substantially indicated in the specification, drawings, or patent-office model were never allowed, and by a recent act of Congress it is provided that no new matter shall be introduced into the specification, nor, in the case of a machine patent, shall the model or drawings be amended except each by the other.*

Repeated decisions also have established the rule that parol testimony is not admissible, in an application for a reissued patent, to enlarge the scope and effect of the invention beyond what was described, suggested, or substantially indicated in the original specification, drawings, or patent-office model, as the purpose of a surrender and reissue is not to introduce new features, ingredients, or devices, but

* 16 Stat. at Large, 206.

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to render effectual the actual invention for which the original patent should have been granted.

Unless, however, it is apparent upon the face of the new patent that the commissioner has exceeded his authority, his decision is final and conclusive, as the jurisdiction to reissue patents is vested in him subject to a single exception, that if there is such repugnancy between the old and the new patent that it must be held, as matter of legal construction, that the reissued patent is not for the same invention as that embraced and secured in the original patent, then the reissued patent is invalid.

Whether a reissued patent is for the same invention as the surrendered original or for a different one, must very largely be determined by a comparison of the two instruments, as the decision must necessarily depend upon the question whether the specifications and drawings of the reissued patent are not substantially the same as those of the original; and if not, whether the omissions or additions are or are not greater than the law allows to cure the defects of the original specification.

Instruments so widely different as are the original patent to Evans and the reissue of it* can hardly be compared within the usual meaning and ordinary application of that word, as they really have substantially nothing in common, so far as respects the description of the invention which they respectively profess to secure. Examples where the difference between the original and reissued patents is as manifest as in this case may perhaps arise, but none such were referred to in the argument of such a striking character, nor are any such within the recollection of the court where the difference between the reissued and original patents is so pervading as in the case in decision.

Wide differences in that regard were exhibited in the case of *Gill* v. *Wells*, recently decided by this court,† but they were by no means as striking and unmistakable as those disclosed in this record. Here the dissimilarity extends to

* See the two instruments set out, *supra*, pp. 536–539.—REP.

† 22 Wallace, 1.

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every part of the description of the invention. There it had respect only to one of the elements of the patented combination.

Attempt was made in that case to emasculate the combination described in the original patent by leaving out one of the material elements in order to give the exclusive right a more comprehensive effect in prosecuting suits for infringement, but in the case before the court the reissued patent is different throughout from the invention embodied in the original patent.

Proof of that proposition is found also in the respective claims of the patents as well as in the respective specifications. What I claim as new and desire to secure by letters-patent, says the original patentee, is a shirt collar made of parchment-paper and coated with varnish of bleached shellac; but the patentee of the reissued patent claims as an article of new manufacture a collar made of long-fibre paper without referring to a coating of any kind; nor is the question affected in the least by the fact that the claim of the respective patents concludes with the phrase, "substantially as described," because the description of what is claimed, as given in the respective specifications, is even more widely different than the claims of the respective patents.

Instead of the phrase employed in the claim of the original patent, the specification to which it refers states that the nature of the invention consists first in making shirt collars of a fabric known to the trade as parchment-paper, or paper prepared with animal sizing, and second, in coating one or both sides of paper shirt collars with a thin varnish of bleached shellac, which, as there represented, not only adds smoothness, strength, and stiffness to the fabric, but also, being a repellent of water, prevents perspiration or other moisture from entering the collar.

Nor will any attempt to construe the claim of the reissued patent by the specification have any tendency to remove the difficulty in the way of the complainants, as the specification is to the same effect as the claim, and shows conclusively that the manufacture there described is a collar made of

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long-fibre paper manufactured in the manner and by the means therein minutely described; that the paper there described is not the parchment-paper described in the specification of the original patent, nor is it paper prepared with animal sizing, nor does the specification or claim of the reissued patent contemplate or require that either side of the collars shall be coated with varnish of bleached shellac for any purpose. Animal sizing, according to that patent, may be *used* or it may be *omitted*, and one or both sides of the paper may be covered with a thin varnish of bleached shellac or such a coating may be *omitted* altogether, which shows that those two requirements of the original patent are not a material part of the invention embodied in the reissued patent.

Authorities to support the proposition that a reissued patent is invalid if not for the same invention as the surrendered original are scarcely necessary, as the rule is universally acknowledged.*

2. Suppose, however, the two may be so construed as to obviate that objection to the reissued patent, still the second defence of the respondents remains to be considered, that the patentee in the original patent is not the original and first inventor of the alleged improvement.

Usually the patent when introduced is *primâ facie* evidence to support the affirmative of that issue, but the representations of the specification may be such as to afford satisfactory proof that the alleged invention is neither new nor useful. Equivalent views were expressed by the Circuit Court in disposing of the question involved in the present issue, and in those views the court here entirely concurs.†

Nothing was known to the supposed inventor respecting paper made of long fibre when he obtained his original patent, except that he previously found, as he states in his reissued patent, a sample of it ready made, suitable for such a purpose, and that he used it and filed it with his original application for a patent. Where he found it does not appear,

* Gill v. Wells, 22 Wallace, 1.

† Paper-collar Company v. Van Deusen, 10 Blatchford, 119

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nor does it appear for what purpose he used it, except that he filed it in the patent office. He does not even state that the original patentee knew who made it, nor that he had any knowledge of the process by which it was made. Viewed in any reasonable light the narration shows that the sample was made by another and not by the supposed inventor, and it affords a strong ground of presumption that he knew nothing respecting the process of manufacturing such paper, or of the constituents of the manufacture, except what is matter of common knowledge.

Hard stock, it is now said, must be used in larger proportions than is required for other descriptions of paper, and that the pulp must be subjected for a greater length of time to the long-beating process, so that the fibre shall be not only long but fine, in order that the paper may be strong, smooth, and even, and that the fibre shall become bedded in the thickness of the paper so as not to mar the surface Neither of such requirements or conditions was contained in the original specification, from which it may be inferred that the original invention did not include the discovery of the constituents of the paper to be used for the purpose, nor the process by which the paper was to be manufactured. Conclusive support to that proposition is found in the specification of the original patent, in which the patentee states that he takes the parchment-paper known to the trade, or paper prepared with animal sizing, and covers one or both sides of it with thin varnish of bleached shellac, and having allowed it to dry, the paper is then passed between polishing rollers, such as are in general use for polishing paper or cloth, which operation finishes the fabric ready to be made into collars.

Enough appears in these suggestions to show that the specification of the original patent does not describe the process of making paper possessing the qualities of long-fibre paper, but the making of collars out of parchment-paper, showing that the discovery that for a good paper collar the manufacturer must have paper which possesses the qualities of long-fibre paper is a subsequent discovery.

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Nor does the statement in the reissued specification, that he produced such a paper or caused it to be produced, strengthen the case for the complainants, because the same specification states in effect that he found a sample of such paper suitable for the purpose and that he used it and filed it with his original application, showing conclusively that the paper existed prior to his supposed invention.

Improvements in the manufacture of paper have often been made, and it may be that the discovery at that period of the constituents for making such paper or of the process by which paper possessing the described properties could be produced would have been the proper subject of a patent. Sufficient appears to show that the patentee learned from his experiments that he wanted paper of the qualities described in the reissued patent, and the evidence proves that he said so to the paper manufacturer, but it is clear that he did not communicate any information to the manufacturer respecting the process by which such paper could be produced, nor did he give the manufacturer any directions upon the subject. Information of the kind he could not communicate for the best possible reason, which is that he was utterly destitute of any knowledge as to the constituents of such paper or the process by which it could be manufactured. Such paper was eventually produced by the manufacturer to whom the patentee applied to make the attempt, after many experiments as to the character of the materials suited to the end, and as to the mode of operation best adapted to effect the desired result, without any assistance whatever from the patentee.

Good paper collars may unquestionably be manufactured from that product, but it is nevertheless true that the patentee is not entitled to a patent for the collars as a new manufacture, for several reasons: (1.) Because he did not invent either the product or the process by which the product is obtained. (2.) Because the collars, apart from the paper of which they are made, are identical in form, structure, and arrangement with collars previously made of linen, paper of different quality, and other fabrics. (3.) Because

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it appears that the patentee is not the original and first inventor either of the paper or of the process by which the paper is made, or of the collar which is denominated a new manufacture.

Articles of manufacture may be new in the commercial sense when they are not new in the sense of the patent law. New articles of commerce are not patentable as new manufactures, unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture or production.*

Nothing short of invention or discovery will support a patent for a manufacture any more than for an art, machine, or composition of matter, for which proposition there is abundant authority in the decisions of this court.†

Suffice it to say that it is not pretended that the original patentee invented either the paper or the process, but the claim in argument is that he was the first person to conceive the idea that paper possessing the described qualities was desirable for the purpose of making such collars, and that inasmuch as he was not a paper manufacturer he had a right to employ trained skill to produce the desired product, and that he, under the circumstances, should be regarded as the actual inventor because he made known to the manufacturer that paper of such qualities would be useful, and because he employed the manufacturer to engage in the effort to produce the desired article; but the patentee communicated no information to the manufacturer as to the constituents or ingredients to be used, or as to the mode of operation by which they were to be compounded in order to produce the desired result.

Where a person has discovered a new and useful principle in a machine, manufacture, or composition of matter, he may employ other persons to assist in carrying out that principle, and if they, in the course of experiments arising from

* Glue Company v. Upton, 6 Official Gazette, 840.

† Hotchkiss v. Greenwood, 11 Howard, 265; Phillips v. Page, 24 Id. 167; Jones v. Morehead, 1 Wallace, 162; Stimpson v. Woodman, 10 Id. 121.

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that employment, make discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original principle, and they may be embodied in his patent as part of his invention.

Doubt upon that subject cannot be entertained, but persons employed, as much as employers, are entitled to their own independent inventions, and if the suggestions communicated constitute the whole substance of the improvement the rule is otherwise, and the patent, if granted to the employer, is invalid, because the real invention or discovery belongs to the person who made the suggestions.*

Apply that rule to the present case and it is clear that the original patentee was not entitled to a patent either for the paper or the process, as he never made any invention or discovery upon the subject.

II. We come now to consider the reissued patent of Gray; one defence to which is that the patentee is not the original and first inventor of the improvement.

Three claims are contained in the reissued patent, substantially as follows: (1.) The turning over of a paper or a paper and cloth collar by a defined line, whether pressed into the material by a die or pointed instrument, or by bending it over the edge of a pattern or block of the proper curve or line, substantially as described. (2.) So turning the part B of a paper or paper and cloth collar over towards the part A, in a curved or angular line, instead of a straight line, substantially as and for the purpose described. (3.) So turning the part B on to or towards the part A, in the manner described, as that a space shall be left between the two parts.

This third claim it is admitted is substantially the same as the second claim, in consequence of which those two claims will be considered together.

1. Collars of paper or paper and cloth, if turned over on

* Agawam Company v. Jordan, 7 Wallace, 602.

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a defined line, are covered by the first claim, whether the line is curved, angular, or straight, and whether the line is made or pressed into the fabric by a die or any pointed instrument, or marked or effected by bending the material over the edge of a pattern or block of the proper or preferred line or curve. Evidently, therefore, it is intended to cover collars turned over on a defined line effected in any possible manner or by any practicable means, if made of paper or paper and cloth. Shirt collars are turned over or down on a curved line in order to prevent the collars from puckering or wrinkling when bent in a circle, and in order to cause the part turned over or down to set out a little from the band portion of the same, so as to admit a necktie between the band and the part of the collar which is turned over.

Manifestly these objects are precisely the same whether the collar be all paper, paper and cloth, or all linen. Hence it is difficult to perceive upon what ground it can be held that any change in the manner of turning down a collar on a curved line, if made of any one of these fabrics, is patentable, if collars of either of the other fabrics have been turned down before in the same manner and precisely for the same purpose.

Evidence is exhibited which shows that many years before the patent was granted in this case paper envelopes and the tops and bottoms of paper boxes were produced by shapers of steel pressed on the material so as to produce defined lines by which the material could be folded. Satisfactory proof is also exhibited that collars made of paper and cloth were, several years earlier than the date of this invention, folded over a piece of metal in a straight line, which is the same process as that described in the specification of this patent, as it appears that the material was bent over a pattern or block to give the proposed curve or line.

Plenary evidence is also exhibited showing that linen collars were ironed on blocks with a groove in the block by which the collar received a defined line for the folding, which accomplished the same purpose as the pattern or block.

Proofs were also exhibited showing that paper collars,

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long before the alleged invention under consideration, were folded by laying upon the unfinished side of the same a piece of tin having at one edge the required curve, which enabled the manipulator to accomplish the same object by pressing upward over such curve a part of the collar so as to mark the line of the curve and crease the paper preparatory to turning the collar over, which enabled the laundress to accomplish the same object as the means described in the specification of the patent.

Support to the answer is also derived from the proofs that linen collars had for years been turned over in a curved line and for the very purpose described, which is to prevent wrinkling and to afford space for the cravat.

Taken as a whole, the proofs in this regard are conclusive, that the patentee is not the original and first inventor of the patented improvement described in either of the claims of his patent.

DECREE AFFIRMED.

THE WOOD-PAPER PATENT.*

THE AMERICAN WOOD-PAPER CO. *v.* THE FIBRE DISINTEGRATING CO.
THE FIBRE DISINTEGRATING CO. *v.* THE AMERICAN WOOD-PAPER CO.

1. A manufacture or a product of a process may be no novelty, and, therefore, unpatentable; while the process or agency by which it is produced may be both new and useful.
2. In cases of chemical inventions, when the manufacture claimed as novel is not a new composition of matter, but an extract obtained by the decomposition or disintegration of material substances, it is of no importance, in considering its patentability, to inquire from what it has been extracted.
3. When the substance of two articles produced by different processes is the same, and their uses are the same, they cannot be considered different manufactures.
4. Paper pulp extracted from wood by chemical agencies alone, is not a different manufacture from paper pulp obtained from vegetable substances by chemical and mechanical processes.

* This case was adjudged October Term, 1873.

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Statement of the case.—History applicable to it.

5. The reissued patent No. 1448 granted to Ladd & Keen, April 7th 1868, for a pulp suitable for the manufacture of paper made from wood or other vegetable substances, is void for want of novelty.
6. The patent granted to Watt & Burgess, July 18th, 1854, was for a process consisting of three stages for obtaining paper pulp from wood. The reissue No. 1449 to Ladd & Keen, dated April 7th, 1868, is for a single-stage process. It is not, therefore, for the same invention. Hence, the reissue is void.
7. Construction of the two boiler patents granted to Morris L. Keen, the one dated September 18th, 1859, and the other June 16th, 1868. Both held to be for combinations.
8. A construction of the patent granted May 26th, 1857, to Marie Amedée Charles Mellier.
   a. The patent covers the process claimed, when applied to wood as well as when applied to straw.
   b. The "*internal pressure*," as described in the specification, is to be ascertained by deducting from the pressure marked by the steam-gauge, the weight of one atmosphere.

CROSS APPEALS from the Circuit Court for the Eastern District of New York.

The preceding case has treated somewhat of the manufacture of paper; though that case had reference chiefly to a manufacture from rags, and by mechanical means. The present case concerns the manufacture of paper; though this case relates more to manufacture from wood, &c., and by chemical agencies.

As most persons know, the materials out of which paper is made, have to be reduced in the paper-mill, before the paper is formed, into what is known as pulp. This pulp, whether obtained from wood or other vegetable substances, is a fibrous material, consisting of what is called in chemistry "cellulose." As such, in its natural state, it is combined with other substances called "intercellular matter," which must be removed to render the cellulose fit for being made into paper. It was well known before the year 1858 that the fibres of cotton or of flax were pure cellulose, and that cellulose existed also in straw and wood, but it had not, so far as is known, been extracted from wood by *chemical* agencies alone, nor brought into a condition to be wrought into paper without mechanical treatment. Even the fibres

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of cotton and of flax, though pure cellulose, required disintegration in order to reduce them to a pulp suited to felt in paper. This was usually effected by mechanical means—by a rag-beating machine—but when thus effected a product had been obtained adapted to the manufacture of paper, a fibrous pulp, the same in kind and capable of the same use as that obtained from straw or wood.

So a pulp had been produced from straw and some varieties of wood by various processes, many of them cumbrous, and all of them perhaps much inferior to the process of Watt & Burgess; two persons, a patent to whom, and certain reissues of it were under consideration in this case. This is shown by numerous well-known patents, and was admitted in this case.

So before the year 1853 the cellulose produced from straw, wood, and other vegetable substances was not produced in the first instance in a condition of purity, other than one approximate. But it was cellulose abundantly suitable for making paper, and could be purified.

So again, prior to the year mentioned, and the patent of Watt & Burgess, the cellulose produced was not in the first instance of the proper consistency and dimensions, and with fibre of the proper length for immediate felting. However, by chemical and mechanical treatment, subsequently applied, it could be made so, and made so completely.

Finally. In no case and by no process prior to 1853 was pulp produced ready for washing and bleaching by a single operation. Successive operations, largely mechanical, were used; the vegetable substances being however sometimes boiled in alkalies, with or without pressure, and disintegration by mechanical means following.

This having been the previous state of the art, the American Wood-Paper Company being engaged, A.D. 1866, in the manufacture of paper pulp and paper from wood, straw, and other vegetable substances under different patents owned by them, including two reissued patents of Watt & Burgess, all of which different patents they alleged could be used conjointly in their business, filed a bill in the court below to

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restrain a company called the Fibre Disintegrating Company from what was alleged to be an infringement.

The defendant company made their paper principally from bamboo; though it was alleged, and there was some evidence to show, that they made it also from straw.

The following were the patents owned by the complainants:

I. Two reissued patents, numbered respectively 1448 and 1449, upon a patent originally granted on the 18th day of July, 1854, and antedated the 19th day of August, 1853 (the date of a patent which had been granted by the British government), to Charles Watt and Hugh Burgess, already named, for an improvement in the manufacture of paper from wood, reissued (to Ladd & Keen) in the two reissued patents numbered as above, on the 7th day of April, 1863; one for an improved manufacture of paper and paper pulp from wood, and the other for the paper and paper pulp, the product of said process of manufacture.

II. A patent granted to Morris L. Keen on the 13th day of September, 1859, for a new and useful improvement in boilers for making paper pulp from wood.

A patent granted on the 16th day of June, 1863, to the said Keen, for an improvement in boilers for making paper pulp.

III. A patent granted on the 26th day of May, 1857, antedated the 7th day of August, 1854, to Marie Amedée Charles Mellier (a Frenchman), for an improvement in the manufacture of paper.

The defendant set up among other things,

1. Invalidity of the Watt & Burgess reissues on the ground, as to No. 1448, that the invention claimed was old; and as to No. 1449 on the same ground of want of novelty, and on the additional ground, one more specially insisted on, that the reissue was for a different invention from that patented; and, therefore, by the terms of the Patent Act,* which required that the reissue should be for the "*same* invention"

* Revised Statutes of the United States, § 4916.

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as the original patent, void. The alleged want of identity consisted in the fact, as alleged, that the original patent described the production of paper pulp in a state ready for washing and bleaching, by three successive stages of work, while the reissue described the production of it by a single operation.

2. That the Keen patents were for combinations, and that all parts had not been used. Accordingly that there was no infringement.

3. Invalidity of the Mellier patent, on the ground of want of novelty in the alleged invention.

Evidence was taken upon all the issues thus raised, and a decree was made,

That the Watt & Burgess patents were void.

That the Keen patents were for combinations, and that defendants were not infringers.

That the Mellier patent was valid, and that the defendants were infringers of it.

Thereupon the complainants appealed from that part of the decree which related to the Watt & Burgess and the Keen patents, and the defendants from that part which sustained the bill as to the Mellier patent.

To enable the reader to understand perfectly the case, the patents under consideration are all set out. This, with a few remarks and some testimony, &c. interposed, it is hoped will enable the reader, who has any general knowledge of the art of papermaking, sufficiently to understand the case.

I.—THE WATT & BURGESS PATENTS.

1. ORIGINAL PATENT JULY 16TH, 1854. ANTEDATED AUGUST 19TH, 1853.

Specification.

The wood or vegetable substances upon which it is intended to operate by this process should first be reduced to very fine shavings or cuttings, the finer the better. This may be done in any suitable machine.

The shavings are then to be boiled in a solution of caustic alkali, the strength of which, being dependent on the nature of vegetable substances operated on, can only be learned by ex-

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perience. For deal or fir wood we find that a solution of alkali of the strength indicated by twelve degrees of the English hydrometer answers very well. The length of time necessary for this part of the process is somewhat dependent on the nature of the vegetable substance to be treated.

We find boiling in a solution of caustic alkali under pressure of considerable service.

We do not claim this operation as a part of our invention.

The shavings are then to be well washed and pressed; and the washings may be saved and evaporated down, and burned in a suitable furnace, when they are again available for the same purpose.

The damp shavings are now to be exposed to the action of chlorine, or the compounds of chlorine with oxygen, till on a portion being placed in a dilute solution of caustic alkali the vegetable substance falls into a dark pulpy mass. This part of the process is conveniently effected by placing the damp shavings on racks or drawers about nine inches apart, one above another, arranged in a chamber, and allowing the chlorine, or the compounds of chlorine with oxygen, to enter the chamber and fill it. Of the compounds of chlorine with oxygen, we prefer that known as protoxide of chlorine, or hypochlorous, or chlorous acid, or euchlorine. If found more convenient, the chlorine, or the compounds of chlorine with oxygen, may be used in aqueous solution instead of the gaseous form.

As soon as the shavings have been sufficiently acted upon by the gas, as may be ascertained by the method above described, they may be removed and the hydrochloric acid, which is the result of the above process, removed by washing, and the shavings well pressed. This should be done with as little water as possible, as this acid may be saved and made use of for the reproduction of chlorine. The shavings are now to be placed in a weak solution of caustic alkali, when they will fall into a pulpy mass of dark brown color. This part of the process may be expedited by exposing this mass to the action of a beater or "engine," placed in a tank containing the solution of alkali.

The pulp thus obtained, as above described, having been freed from the alkali by washing (which may be saved as before directed), may now be bleached by the usual process, or, as we prefer, by chlorite or hypochlorite of soda or potash, liberating the chlorous or hypochlorous acid by hydrochloric acid.

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Having thus fully described the nature of our invention, and shown how the same may be reduced to practice, we wish it to be distinctly understood that we do not confine our claim to the apparatus or utensils, or the manipulations herein named, as they may be varied to suit the circumstances of the case.

Claim.

But what we do claim as of our invention, and desire to secure by letters-patent, is the pulping and disintegrating of shavings of wood and other similar vegetable matter for making paper, by treating them with caustic alkali, chlorine simple, or its compounds with oxygen and alkali, in the order substantially as described.

As has been already stated (*supra*, p. 569), one ground set up by the defendants as a defence to the bill was, that the original patent and the reissue No. 1449 were not for the same invention; the allegation of the defendants being that the original patent was for the production of the pulp ready for bleaching and washing by a single operation, whereas in the reissue No. 1449 three distinct operations, following each other in order of time, were adopted.

In support of this their view the defendants showed that in March, 1854, before the original patent was granted, but while an application for it was pending, the Commissioner of Patents wrote to Watt & Burgess stating that there were "at least forty other applications for patents, or patents on record, for processes of treating vegetable fibre," and that "in a large part of these alkali and chlorine or its compounds were used;" and requesting Watt & Burgess to make "a clear and definite expression of what the novelty in their devices was confined to, both in the specifying of the nature of the invention and in setting forth the claim."

The defendants showed further that in reply Watt & Burgess, through their counsel, said:

"The invention relates to a series or combination of processes, *in the order in which they are stated*, for treating shavings, &c., for the purpose of reducing them from their crude state to a pulp, ready to be made into paper. The *several* processes through

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which the shavings pass, may be enumerated in the following *order*, viz.:

"First. The shavings are boiled in a solution of caustic alkali, until by the test of washing they have lost their woody taste (for white pine shavings about three hours), when they are washed and pressed to rid them of the alkali.

"Second. They are then subjected to the action of chlorine, or its compounds and oxygen, until by testing a portion in a dilute solution of caustic alkali, it falls into a dark pulpy mass, when it is again washed and pressed to remove the hydrochloric acid, which is the result of this process.

"Third. The material is then subjected to a weak solution of caustic alkali, when it falls into a pulpy mass of a dark-brown color. It is then again washed to free it of the alkali, and may be bleached by any of the known processes.

"The shavings must pass through these several processes, *and in the order stated*, and this constitutes the invention. The processes taken separately will not produce the article, but their sum will, and they are only claimed in their series, and not in their individual capacities. It is admitted that alkali and chlorine have been used in pulping vegetable matter. But it is not known that alkali, chlorine, oxygen, and alkali, have been used in the manner, and in the order, in which Messrs. Watt & Burgess use them. *This order and series of processes* is what, therefore, constitutes their invention, and what they suppose they have embodied in their claim."

After some further discussion the patent, from which the above specification is quoted, was granted.

The testimony of Burgess, one of the original patentees, was taken by the complainants. He said:

"I began to make experiments on the preparation of pulp for making paper from wood in 1851, with Mr. Watt. On account of his great age, making most of the experiments devolved on me. . . . I produced a good pulp by boiling wood in caustic alkali at a high pressure. I found that some woods required much more alkali than others. I found that when intercellular matter was not wholly removed by caustic alkali it could be decomposed by chlorine, or the hypochlorides, one answering the purpose as well as the other. I used, therefore, chlorine or bleach-powder, preferably chlorine, since one of the products

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attending the elimination of chlorine, namely, sulphate of soda, had a marketable value in England. I found that to a certain extent, and when desirable, I could substitute the employment of caustic alkali for chlorine, the one for the other, but the nature of the wood under treatment materially affected this substitution. I found the greater quantity of intercellular tissue was removed by the caustic alkali, the less chlorine or its compounds with oxygen was required, and consequently the higher the temperature and pressure, and the greater the strength of the alkali employed the less of the intercellular tissue was left, and consequently less chlorine or its compounds with oxygen required; but if sufficient caustic alkali was employed at a requisite temperature, chlorine was only necessary for bleaching purposes. As regards the cost, the chlorine process appeared to cost less than the free use of alkali, since one of the products of its elimination is a marketable article in England, and we calculated on the sale of the sulphate of soda as one of the sources of profit in working the patent. In drawing up the specification for a patent I therefore laid most stress on the process that seemed to offer the greatest pecuniary advantage, since the recovery of the soda-ash had not been practically tried by us at this time, and we were in uncertainty as to the success of such recovery. With a knowledge of the above facts, I was desirous of embracing in my specification the modes of producing wood-pulps with caustic alkali, either with or without steam pressure; supplementing when necessary the alkaline boiling, with the subsequent treatment of chlorine or the hypochlorides.

"I prepared a description of my invention—a provisional specification—prior to my application for an English patent. I here annex a copy of the specifications, both provisional and final, of the English patent.

"The wood upon which it is intended to operate by this process should first be reduced to very fine shavings, the finer the better; this may be done by any suitable machine.

"The shavings should then be boiled in caustic alkali of the strength indicated by about 12° of the English hydrometer. This process is much better performed under pressure, after the wood has been boiled for about twenty-four hours, but we do not confine ourselves to this time, as it varies with the nature of the wood and amount of pressure, and it should be well washed and squeezed to remove all the alkali.

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Statement of the case.—Watt & Burgess's reissue 1448.

"It is then placed in a chamber furnished with racks about nine inches apart, upon which the wood is placed and exposed to the action of chlorine, or any of the compounds of chlorine with oxygen, however obtained. The wood should be exposed to the action of chlorine or its compounds with oxygen until it assumes an orange color and falls into a pulpy mass on the addition of caustic alkali."

[Here followed a plan, stated to be a convenient and economical means of obtaining chlorine.]

"When the wood has been sufficiently acted upon by chlorine, or its compounds with oxygen, it is to be removed from the gasing-chamber, and the HCl with which it is saturated, which is formed by the action of the chlorine, is to be removed with water and the wood pressed so as to remove as much of the water and acid as possible. After all the acid has been removed from the wood, it is to be placed in a suitable vessel, and a weak solution of caustic alkali poured upon it so as to cover it, when the wood falls into a pulpy mass of a dark-brown or almost black color. . . . The pulp, after being well washed, has now to be bleached. This may be done in the usual way, or we prefer to add a certain quantity of chlorite of soda, called also hypochlorite, and liberating the hypochlorous acid by dry HCl. The quantity of chlorite of soda can only be learned by experience."

We now pass to—

2. REISSUE (1448) PRODUCT PATENT, APRIL 7TH, 1868.

The most important feature of this patent to be noted is its *claim;* the matter of identity between the original and reissue, not being a matter which need, in this No. 1448, specially engage the reader's attention, that matter occurring as one to be attended to chiefly in considering the original and the reissue No. 1449.

Be it known that Charles Watt and Hugh Burgess did invent a new and useful improvement in the manufacture of paper-pulp, from wood and other vegetable substance.

Specification.

The wood or vegetable substance, from which it is intended

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effect, holding the invention to be substantially the same as that in the Watt & Burgess reissue No. 1449, already considered.

But in *Buchanan* v. *Howland*,* when the patent was presented for construction in the Northern District of New York, the principle of the discovery was held to be that the known effects of a solution of pure caustic soda, which had been previously used for boiling straw and other fibrous materials of a similar character and texture, in open vessels, in which the heat could be raised only to 212° Fahrenheit, might, by the use of a much higher degree of heat, not less than 310°, be advantageously and greatly increased, while at the same time the reduction of the materials to paper-pulp would be more economical, inasmuch as it dispensed with the large quantities of alkali which had been previously employed. This resembles the construction adopted in the court below, though not exactly the same. And such, we think, is the true construction of the specification, and the process described is, we think, an attempted embodiment of this principle. Undoubtedly the patentee in framing his process made use of known agents. The use of caustic alkali in reducing vegetable substances to paper-pulp was no novelty. Neither was boiling under pressure. But a process combining those things with a certain specified arrangement of the strength and quality of the alkaline solution, and a defined regulation of the heat and pressure, may well have been patentable if it had no other novel result than the production of paper-pulp more economically. In the specification the improvement claimed is declared to consist "in subjecting straw or other fibrous materials to a pressure of at least seventy pounds on the square inch when boiling such fibrous matters in a solution of caustic alkali." Then follows a description of the mode in which the improvement is effected, in which not only is the minimum of pressure or heat described, but the strength of caustic alkali used is approximately defined. The heat is specified by

* 2 Fisher, 841.

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stating it as equivalent to at least seventy pounds on the square inch, internal pressure, on the boiler, and the strength of the alkali used is described as from two to three degrees of Baumé, or of a specific gravity of from 1.013 to 1.020. These are to be used together in a boiler where a steam gauge will render it possible to ascertain when the pressure has attained the required degree. A certain strength of alkaline solution, and a degree of heat, indicated by a minimum pressure, are essential elements in the process. The precise proportion of alkali used is not specified, but it is described as about sixteen per cent., that is, sixteen pounds to one hundred of the fibrous substance under process. The heat is described as that which is equivalent to at least seventy pounds internal pressure on the boiler, or, as the patentee says, equivalent to 310° Fahrenheit. Quite evidently by using the phrase "internal pressure," the patentee intended artificial pressure alone, that produced by the application of heat, and the measure of the heat. If so, the pressure, as measured by the steam-gauge, instead of being seventy pounds, is the weight of one atmosphere ($14\frac{7}{10}$) less, or $55\frac{3}{10}$ pounds. This was the opinion of the court below, and in that opinion we concur. That the patentee so understood it is manifest from the fact that he defined seventy pounds internal pressure on the boiler as being equal to about 310° of Fahrenheit. It is much more than equal to that temperature if the pressure is marked by the steam-gauge, unless the weight of the atmosphere be deducted. But if from it be deducted the weight of one atmosphere, the remainder ($55\frac{3}{10}$) approximately corresponds with the temperature named. Sixty pounds pressure exceeds 310° Fahrenheit, even with distilled water, and still more with an alkaline solution. It is, then, altogether probable the French tables of steam-pressures, recognized throughout the scientific world, were in the patentee's mind. They start from a vacuum at zero, and make ordinary atmospheric pressure $14\frac{7}{10}$ pounds, whereas safety valves and manometer gauges in this country are always graduated so as to express the pressure in pounds, exclusive of that of the atmosphere.

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Mellier was a Frenchman and probably familiar with the French tables.

Understanding the terms used in the specification thus, the elements of the process claimed are, 1st, the use of a solution of pure caustic soda (natrium and oxygen), from two to three degrees Baumé strong; and, 2d, boiling the materials to which the process is applied in the solution raised to a temperature of not less than 310° Fahrenheit, which, of course, implies the use of a close boiler. The preparation of the materials for the process is no part of it, nor is the subsequent washing and bleaching.

The claim, it is true, in referring to the material to be treated, mentions only straw, but the object of the claim was to secure a monopoly of the process, not to enumerate the materials to which it might be applied. They had already been described in the specification, and there was no necessity for mentioning any of them in the claim. It is true the patent cannot be extended beyond the claim. That bounds the patentee's right. But the claim in this case covers the whole process invented, and the complainants seek no enlargement of the process. Certainly the claim of the process ought not to be regarded as excluding all other substances than the one mentioned. As already noticed, the specification avows the object of the invention to be a process for treating straw *and other vegetable fibrous materials requiring like treatment preparatory to the use of such fibres in the manufacture of paper.* The subject to be treated is fibrous materials of a vegetable nature. And it may well be doubted, in view of this general declaration of the object, whether there is anything that limits the scope of the invention to a process of treating straw and other like materials. The language of the patent is not "straw and other like vegetable materials." The specification speaks of "straw or such other fibrous matters," of "straw or fibrous matters," of "straw or fibrous substance," "straw or other fibrous material," and it uses other similar forms of expression, but all of them clearly referring to fibrous materials requiring treatment like that required by straw for the pro-

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duction of paper-pulp. It would, therefore, in our opinion, be too narrow a construction of the patent to hold that it is for a process applicable only to straw or other similar vegetable substances, and not applicable to vegetable substances generally requiring like treatment for the uses mentioned.

It remains only to inquire whether the defendants have infringed upon the complainants' rights as thus defined, for no sufficient reason has been given to justify our holding the patent void. This part of the case presents real difficulty. If there has been any infringement it was very slight. Admitting that bamboo, which is the subject principally used by the defendants (though there is some evidence that straw was also used), is one of the vegetable fibrous materials to which the complainants have an exclusive right to apply their process, does the evidence show that the process has been applied? Certainly it has not, unless in boiling bamboo or straw the minimum degree of heat and pressure specified in the patent has been employed by the defendants in their treatment of vegetable substances. The evidence upon this subject is that while using an alkaline solution of less than 8½ degrees Baumé the defendants have sometimes used an external pressure, as measured by the gauge, of from forty to sixty pounds, the latter being equivalent to an internal pressure of nearly seventy-five pounds, or a temperature above 310°. This may have been, and it probably was, only occasionally, but it was, nevertheless, an invasion of the monopoly. In regard to the strength of the solution of caustic alkali employed, there is evidence that the general strength was from two and a half to three degrees Baumé.

Upon the whole, therefore, we have come to the same conclusions as those reached by the court below.

DECREE AFFIRMED: each party to pay his own costs in this court.

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APPENDIX.

SECTION 709 of the Revised Statutes of the United States (in its main provisions, the same as the twenty-fifth section of the Judiciary Act of 1789, and the second section of the act of 1867, much similar to it) being referred to in the body of this book more than once, is here given below. The section, for convenience of reference, is broken up by the reporter into paragraphs.

SECTION 709. A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had,

Where is drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision is against their validity,

OR where is drawn in question the validity of a statute of or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity,

OR where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority,

May be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.

The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States; and the proceeding upon the reversal shall be the same, except that the Supreme Court may, at their discretion, proceed to a final decision of the case, and award execution or remand the same to the court from which it was so removed.

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INDEX.

ABANDONED AND CAPTURED PROPERTY ACT.

Under the act which gives to "the *owner*" of any abandoned and captured property a right, after it has been sold by the government, to recover the proceeds of it in the Treasury of the United States, a factor who has merely made advances on the property—there being another person who has the legal interest in the proceeds—is not to be regarded as "the owner;" at least not to be so regarded beyond the extent of his lien. *United States* v. *Villalonga*, 35.

"ABSENT FROM DUTY WITH LEAVE." See *Army Officer*.

Meaning of the expression within the act of March 3d, 1863. *United States* v. *Williamson*, 411.

ACCEPTANCE, QUALIFIED. See *Life Insurance*.

ACCIDENTAL FIRE. See *Anchor-ground; Principal and Agent; Towing Tug*.

ACCORD AND SATISFACTION. See *Omnia præsumuntur rite esse acta; Pleading*, 2.

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ADMIRALTY. See *Anchor-ground; Collision; Evidence*, 1, 3; *Pilot; Principal and Agent; Proceeding in rem; Salvage; Ship-master; Towing Tug*.

AGENT. See *Principal and Agent*.

ALIEN. See *Estoppel; Practice*, 8.

ALLUVION.

1. Means an addition to riparian land, gradually and imperceptibly made, through causes either natural or artificial, by the water to which the land is contiguous. *County of St. Clair* v. *Lovingston*, 46.
2. The test of what is gradual and imperceptible is that, though the witnesses might see from time to time that progress has been made, they could not perceive it while the process was going on. *Ib.*
3. It matters not whether the addition be on streams which overflow their banks or those that do not. In each case it is alluvion. *Ib.*

AMENDMENT. See *Practice*, 13.

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ANCHOR-GROUND.

A vessel anchored in the Hudson, opposite to the Hoboken wharves, if anchored three hundred and fifty yards from their river front, is anchored so far from shore that in case of a collision with a vessel towed in flames out of the Hoboken docks, no allegation can be made that she is anchored too near the shore. *The Clarita*, 1.

ANCHOR-WATCH.

A vessel at anchor having an anchor light and one man on deck, though not strictly an anchor-watch, is guilty of no fault in not being better lighted or watched. *The Clarita*, 1.

ARBITRATION AND AWARD. See *Pleading*, 2.

ARMY OFFICER.

1. One who is ordered, even on his own request, to proceed to a particular place, including his home, and "there *await orders*," reporting thence by letter to the Adjutant-General of the Army and to the headquarters of the department to which he then belongs, is not an officer "absent from duty with leave" within the act of Congress of March 3d, 1868, which enacts that "any officer absent from duty with leave, except from sickness or wounds, shall during his absence receive half of the pay and allowances prescribed by law, and no more." *United States* v. *Williamson*, 411.
2. The action of army officers in matters of a judicial character, especially when done in the wilds of the West, to be favorably construed and so that they may have effect rather than perish. *United States* v. *Shrewsbury*, 508.

ASSIGNMENT OF ERRORS.

Quære. Whether a general assignment of errors, on a special case, "that the judgment below was for the wrong party," is a sufficient assignment. *Scholey* v. *Rew*, 331.

"AWAITING ORDERS." See *Army Officer*.

The meaning of the expression in connection with the act of Congress of March 3d, 1868. *United States* v. *Williamson*, 411.

BANKRUPT ACT.

1. Where a person has bought land subject to a vendor's lien, and has given his notes for payment of the purchase-money, the obligation of another person who buys the land from him and assumes to pay the notes, will be discharged so far as the notes are concerned, by his discharge under the Bankrupt Act; but the vendor's lien is not discharged. *Lewis* v. *Hawkins*, 120.
2. When District Courts sitting in bankruptcy mean to order a sale of the real estate of the bankrupt which he has mortgaged, in such a way as to discharge it of all liens, and so that the purchaser have a title unincumbered, it is indispensable that the mortgagee have notice of the purpose of the court to make such an order; or that in some other way he have had the power to be heard, in order that he may show why the sale should not have the effect of discharging his lien.

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BANKRUPT ACT (*continued*).

And if a sale be made without any notice to him, his mortgage is not discharged. *Ray* v. *Norseworthy*, 128.

8. What cases are cases in equity within the eighth section of the Bankrupt Act, which gives an appeal to the Circuit Court from cases in equity, and what are *not* cases for the general supervisory jurisdiction given in the second section of the act. *Stickney* v. *Wilt*, 150.
4. What cases, on the other hand, are *not* "cases in equity" and capable of being taken on appeal into the Circuit Court as cases in equity under the eighth section of the Bankrupt Act, but must be taken there, if taken at all, under the supervisory jurisdiction given by the second section of the act. *Sandusky* v. *National Bank*, 289.
5. The Supreme Court has no jurisdiction to review the action of the Circuit Court when acting under this general supervisory jurisdiction, given by the second section of the Bankrupt Act. *Ib.*
6. The Circuit Court has no jurisdiction under this second section to review a case which is really a case "in equity." *Stickney* v. *Wilt*, 150.
7. Neither does an appeal to hear and determine the merits lie to this court from the action of the Circuit Court, if it undertake to review such a case; though where a party against whom the District Court has decreed, has taken into the Circuit Court a case really one in equity,—taken it, as above said, improperly,—and obtained a reversal of such decree, this court, to prevent injustice, will so far take cognizance of the case as to reverse the judgment of the Circuit Court and remand the case with directions to dismiss the suit. *Ib.*

BANKS. See *National Banks.*

BILL IN EQUITY,

Cannot by colorable allegations be made the means of recovering land open to an action of ejectment. *Lewis* v. *Cocks*, 466.

BOUNDARY. See *Alluvion.*

Where a survey begins "on the bank of a river" and is carried thence "to a point in the river," the river-bank being straight and running according to this line, the tract surveyed is bounded by the river. It is even more plainly so when it begins at a post "on the bank of the river, thence north 5 degrees east up the river and binding therewith." *County of St. Clair* v. *Lovingston*, 46.

CAPTURED AND ABANDONED PROPERTY ACT.

A mere factor cannot be considered "owner"—at least not beyond the extent of his lien, in a proceeding to recover the proceeds in the treasury of property sold under this act; the act giving to "the owner" alone a right to recover them. *United States* v. *Villalonga*, 35

CHANCERY. See *Equity; Laches.*

COLLISION. See *Anchor-ground; Anchor-watch.*

1. In cases of, where there is a great conflict of testimony, the court must be governed chiefly by undeniable and leading facts, if such exist in the case. *The Great Republic*, 20.

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COLLISION (*continued*).

2. A pilot, when he is close to a vessel before him making movements which are not intelligible to him, ought not, in a case which is in the least critical, to be governed by his "impressions" of what the vessel is going to do; but should make and exchange signals, and ascertain positively her purposed movements and manœuvres. *The Great Republic*, 20.
3. A steamer close to the right bank of a broad river—one, *ex. gr.*, half a mile broad—which means to cross over and land on the left shore, is not bound, in the first instance, to give *three or more* whistles, which is the signal for landing. It is enough that she give *two* whistles, which is the signal that she is going to the left. *Ib.*
4. Constructions not favorable put on the testimony and manœuvres of a pilot who, it was proved, was "addicted to drinking when ashore," and who confessed to having been drinking on the day when his vessel left port, and within an hour of which time a collision occurred; though he swore that he had not taken any drink for six hours before his boat left its dock. *Ib.*
5. Similar constructions put on the conduct of a captain whose watch it was, but who, instead of being engaged in a proper place in superintending the navigation of his vessel, was on the lower deck conversing with a passenger. *Ib.*
6. A large and fast-sailing steamer is bound to act cautiously when overtaking and getting near to a small and slow one; and a collision having occurred between two steamers of this sort, a minor fault of the small and slow steamer was held not to make a case for division of damages where such fault bore but a little proportion to many faults of the large and fast one. *Ib.*
7. When, in a case of collision, it appears that one of the vessels neglected the usual and proper measures of precaution, the burden is on her to show that the collision did not occur through her neglect. *Ib.*
8. A steamer held to be exclusively responsible for a collision with a sailing-vessel; the collision having occurred on a night when the stars were plainly visible, and when, though a little haze was on the water, the night was to be called clear; there having apparently been some want of vigilance in the lookout of the steamer, who did not discern the sailing-vessel until the steamer was close upon her, at which time orders, which, as the result proved, tended to bring on a collision, were given on board the steamer. *The Sea-Gull*, 165.
9. Two steam vessels, one an iron steamship (an ocean vessel of twenty-five hundred tons), coming from sea up the Mississippi to New Orleans, and the other a small river steamer of one hundred and thirty-five tons, trading up and down the river below New Orleans from plantation to plantation, and carrying passengers, and getting market produce for the city just named, *held*, in a case of collision, to be equally in fault for running at full speed in a very dark and foggy night, after they had learned by signals from each other of their respective existences in the river, and while they were in doubt as to what respectively were their courses and manœuvres. *The Teutonia*, 77

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COLLISION (*continued*).

10. The rule of navigation prescribed by the act of Congress of April 29th, 1864, "for preventing collisions on the water," which requires "when sailing-ships are meeting end on, or nearly so, the helms of both shall be put to port," is obligatory from the time that necessity for precaution begins, and continues to be applicable so long as the means and opportunity to avoid the danger remain. *The Dexter*, 69.

11 In a collision at sea, happening on a bright moonlight night, and when the approaching vessel was seen by the officer in charge of the deck long before the collision: *Held*, that the absence of a lookout was unimportant, if his presence would have done nothing to avert the catastrophe. *Ib.*

COMMERCIAL BROKER. See *Internal Revenue*, 8.

CONSTITUTIONAL LAW.

The "succession tax," imposed by the acts of June 30th, 1864, and July 13th, 1866, on every "devolution of title to any real estate," was not a "direct tax," within the meaning of the Constitution; but an "impost or excise," and was constitutional and valid. *Scholey* v. *Rew*, 331.

CONSTRUCTION, RULES OF.

I. As applied to Statutes or Constitutions.

A badly expressed and apparently contradictory enactment interpreted by reference to the Journals of Congress, where it appeared that the peculiar phraseology was the result of an amendment introduced without due reference to language in the original bill. *Blake* v. *National Banks*, 308.

II. As applied to Contracts.

Where—on the sale of a steamboat whose then owners had contracted various debts in building and furnishing her, some of which debts were liens on the boat and some not—certain persons, friends of the purchaser, agreed to "defend and save the said vendor, free and harmless of any and all claims and demands that *may* arise or be brought against said steamboat," *held*, that the expression referred to debts existing at the date of the sale, and not to debts that might be contracted after it; and meant to protect the owner from all liability arising from his part-ownership of the boat, irrespectively of the fact whether the debts were liens on the boat or not. *Moran et al.* v. *Prather*, 492.

CONTRACT. See *Evidence*, 2–4; *Life Insurance*.

When to be interpreted by the light of surrounding circumstances. *Moran et al.* v. *Prather*, 492.

COSTS.

Where confessedly the title of a party claiming land as owner, and who has agreed to sell, is denied by the vendee and a dispute has taken place about title, so that a tender of a deed would be a useless ceremony, costs on a bill filed to enforce the payment of the purchase-money must abide the result of the suit. *Lewis* v. *Hawkins*, 119.

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COURT OF CLAIMS. See *Practice*, 11.

CUMBERLAND COUNTY, PENNSYLVANIA. See *National Banks*, 2.

CUSTOMS OF THE UNITED STATES.

1. The act of May 22d, 1846, enacting that "in all computations at the custom-house, the franc of France . . . shall be estimated at eighteen cents and six mills," is repealed by the act of March 3d, 1873, "to establish the custom-house value of the sovereign or pound sterling of Great Britain, and to fix the par of exchange." *Held*, accordingly, that the Director of the Mint having, in pursuance of the latter act, estimated the value of the franc of France at nineteen cents and three mills, and the Secretary of the Treasury having on the 1st of January, 1864, proclaimed it as of that value accordingly, goods invoiced in French francs and entered in a custom-house here in March of that year, were to be charged at the new valuation of the franc. *The Collector* v. *Richards*, 246.
2. "Silk ties" are chargeable under the Tariff Act of July 30th, 1864, with a duty of 50 per cent. *ad valorem*. *Smythe* v. *Fiske*, 374.

DAMAGES. See *Liquidated Damages*.

A company having coal-mines at a place on the Mississippi, *eighty miles above* Cairo, agreed to deliver at the mines a quantity of coal, the product of the mines, to P. & S., during the year 1870. There was no other market at the place for the purchase of coal but that of the company itself. The company broke its contract. No coal was delivered. On suit by P. & S. against the company, for breach of contract, *Held*,

1st. That the measure of damages (in view of the fact that there was no market for the purchase of coal at the place of delivery but that of the company itself) was the price which P. & S. would have had to pay for coal of the sort in the quantities in which they were entitled to receive it from the company under the contract, at the nearest available market where it could have been obtained. *Grand Tower Company* v. *Phillips et al.*, 471.

2d. That the cash value of similar coal, at Cairo, or at points below it on the Mississippi River, after deducting the contract price of it, and the cost and expenses of transporting it thither, was not a true measure of value, and that it was error to allow such value to be shown to the jury, so long as any more direct method was within reach. *Ib.*

DECREES IN FORECLOSURE.

This court calls the attention of the Circuit Courts to what was said by Taney, C.J., in *Forgay* v. *Conrad* (6 Howard, 201), as to the care which ought to be exercised in the preparation of decrees of foreclosure; and observes that much time of this court and much expense to litigants will be saved if more attention is given to the form of decrees when entered. *Railroad Company* v. *Swasey*, 406.

DEED. See *Feme Covert*.

DIRECT TAX. See *Constitutional Law*.

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DISCHARGE OF LIEN. See *Bankrupt Act*, 1, 2.

DUTIES. See *Customs of the United States.*

EJECTMENT. See *Bill in Equity.*

EMINENT DOMAIN.

1. The taking of private property in order that a railroad may be made, belongs to the class of things which in proper cases are to be regarded as public necessities. *Secombe* v. *Railroad Company*, 109.
2. The *mode* of exercising the right of eminent domain, in the absence of any provision of organic law prescribing a contrary course, is within the discretion of the legislature, upon whose power in this respect there is no limitation if the purpose be a public one, and if just compensation be paid or tendered to the owner for the property taken. *Ib.*
3. A judgment of condemnation in a matter of eminent domain rendered by a competent court, charged with a special statutory jurisdiction, and when all the facts necessary to the exercise of the jurisdiction are shown to exist, is not subject to impeachment in a collateral proceeding. *Ib.*

EQUITY. See *Bill in Equity; Costs; Feme Covert; Laches; Vendor's Lien.*

In a court of conscience deliberate concealment is equivalent to deliberate falsehood. When a living man speaks in such a court to enforce a dead man's contract with himself against parties who he knows are ignorant of the facts, he must be frank in his statements, unless he is willing to take the risk of presumptions against him. *Crosby* v. *Buchanan*, 420.

ESTATE FOR LIFE. See *Shelley's Case, Rule in.*

ESTOPPEL. See *Omnia præsumuntur rite esse acta; Pleading; Practice*, 18.

An alien to whom a devise of an interest in real estate has been made, and who has received its value in proceedings for partition, is estopped to set up against a demand for a succession tax thereon, that by the law of the State where the estate is, the devise is absolutely null and void. *Scholey* v. *Rew*, 331.

EVIDENCE.

1. Where there is great contradiction in the testimony in a case (a thing very common in causes in admiralty for collision), the court must be governed chiefly by leading and undeniable facts, if any such exist in the case. *The Great Republic*, 20.
2. The right of a partner to sign the firm name to a contract of indemnity in favor of third persons must be strictly proved; but it need not necessarily be proved by a written authority to him. *Moran et al.* v. *Prather*, 492.
3. Where a firm, with several persons styling themselves, as a firm in the case now here indexed did, "creditors of the steamboat B.," agreed to release P. (owner of $\frac{17}{32}$ parts of the boat, the rest being owned by two other persons) "from all indebtedness due us by the said steamboat *so far as the said P. is concerned*," and where, on P 's being about to sell to C. for a price greatly below its value had it been

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EVIDENCE (*continued*).

clear of debts, his interest in the steamer, on condition that C. would assume and pay all debts, the firm executed an agreement by which they bound themselves to defend and save the said P. free and harmless of any and all claims and demands that *may arise or be brought against said steamboat* excepting those above signed. *Held*,

(*a*) That it was not allowable to show by oral testimony that the expression "steamboat debts" was a well-known term among steamboat men and merchants in the port where the vessel was, and meant "debts that made a lien on the boat for supplies and material," though only for six months; and that when a debt could not be enforced by any of the conservatory processes allowed by the laws of the State, it ceased to be "a debt of the boat," though it might remain a debt of the owner. *Moran* v. *Prather*, 492.

(*b*) That it was allowable to show that the boat was a very valuable one, and that the money price paid for her was insignificant in comparison with it, in order to infer that the purchaser had assumed the payment of existing debts against her. *Ib.*

4. On a suit against a company for breach of contract in not having delivered coal according to the contract, letters passing between the president of the company and the local agent at the place where the coal was delivered, containing private instructions to such agent, cannot be read to fix the measure of damages; the reasons and motives which the company or its officers had in not furnishing coal to the plaintiffs not being in issue. *Grand Tower Company* v. *Phillips et al.*, 471.

FACTOR.

Under the Abandoned and Captured Property Act, which gives to "the owner" of any such property a right, after it has been sold by the government, to recover the proceeds of it in the Treasury of the United States, a factor who has merely made advances on the property—there being another person who has the legal interest in the proceeds—is not to be regarded as "the owner;" at least not to be so regarded beyond the extent of his lien. *United States* v. *Villalonga*, 85.

FEME COVERT. See *Shelley's Case, Rule in.*

A defectively acknowledged deed for land held, on a suit by a woman for dower, to be validated by a curative act of Assembly; the husband having received the purchase-money for the land sold, and the whole of it having, on his death, passed to his wife. *Randall* v. *Kreiger*, 187.

FINAL DECREE. See *Jurisdiction*, 4, 5, 6, 7, 8.

FIRE.

The obligation of tugs whose business it is to tow vessels on fire stated. Other principles of law in the case of burning vessels also stated. *The Clara and The Clarita*, 1.

FORECLOSURE. See *Decrees in Foreclosure.*

FRANC OF FRANCE. See *Customs of the United States*, 1.

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GUARANTEE. See *Evidence*, 2.

HUDSON RIVER. See *Anchor-ground.*

INSURANCE. See *Life Insurance.*

INTEREST REIPUBLICÆ UT FINIS SIT LITIUM. See *Laches.*

INTERNAL REVENUE. See *Constitutional Law; Estoppel; National Banks.*

1 Under the seventy-ninth section of the Internal Revenue Act of 1864, as amended by the act of July 13th, 1866, persons who sell goods in their own name, at their own store, on commission, and have possession of the goods as soon as the sales are made, and who deliver or send them off to their customers—such sales being to an extent exceeding $25,000 per annum—are to be taxed as "wholesale dealers," not less than persons who sell to that amount on their own account. *Slack* v. *Tucker & Co.*, 321.

2. The fact that the manufacturers of the goods paid the five per cent. known as the "manufacturers' tax" does not change the case. *Ib.*

3. Persons selling goods in the way stated in the first paragraph above, are not "commercial brokers" within the fourteenth clause of the said section. Such brokers are those persons who, as brokers merely, negotiate sales or purchases for others, and not in their own names nor on their own account. *Ib.*

4. A devise of an equitable interest in real estate, in which personal property had been invested by the trustee with the assent of the devisor, before the making of the will, was a "devolution of real estate" within the meaning of the acts of June 30th, 1864, and July 13th, 1866, and the devisee is liable to the "succession tax" imposed thereby, in respect of it, if he has received its value, although in proceedings for partition he has had assigned to him only personal property. *Scholey* v. *Rew*, 331.

JOURNALS OF CONGRESS.

Sometimes used to explain an otherwise unintelligible or scarce intelligible act of Congress. *Blake* v. *National Banks*, 308.

JUDICIAL COMITY.

When the question is whether, under the constitution and laws of a particular State, a company professing to be a corporation, is legally so, this court will receive as conclusive of the question, the decision of the highest court of the State deciding, in a case identical in principle, in favor of the corporate existence. *Secombe* v. *Railroad Company*, 108.

JUDICIAL SALE. See *Bankrupt Act*, 2.

JURISDICTION. See *Judicial Comity; Practice*, 5; *Proceeding in rem; Res Judicata.*

OF THE SUPREME COURT OF THE UNITED STATES.

(a) IT HAS JURISDICTION,

Under section 709 of the Revised Statutes, and as embracing a Federal question,

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JURISDICTION (*continued*).

1. When in a suit by a person who seeks to recover property on the ground that a judgment and execution on it by a court of the United States, interpreting a statute of the United States, has deprived him of the property in violation of the first principles of law—the defendant sets up a title under that judgment and execution, and the decision is against the title so set up. *Gregory* v. *McVeigh*, 294.

(*b*) It has NOT jurisdiction,

Under section 709 of the Revised Statutes, and as embracing a Federal question,

2. When the matter in the court below (the highest court of the State) involved nothing but the propriety of dissolving an ordinary injunction, although in a court inferior to that one—an inferior State court, and in whose decision on the matter both parties acquiesced—a Federal question may have been involved. *Fashnacht* v. *Frank*, 416.
3. Nor where the case is really rested on the fact of a trust proved and on the extent of a State court's equitable jurisdiction (matters confessedly not within the section), even though the court, in deciding against the party now plaintiff in error here, say: "The most that can be said is that the transaction was in violation of an act of Congress;" it adding "but that would not give a Court of Chancery jurisdiction to hold the second purchaser a trustee, and make him accountable as such." *Smith* v. *Adsit*, 368.

Nor as of *final* decree,

4. Of a decree dissolving an injunction, unless there be a dismissal of the bill. *Thomas & Co.* v. *Wooldridge*, 284.
5. Nor until the whole case below is disposed of. *Crosby* v. *Buchanan*, 420.
6. Nor of an order of the Circuit Court remanding, for want of jurisdiction to hear it, a case removed from a State court into it. *Railroad Company* v. *Wiswall*, 507.
7. Nor of a decree of foreclosure and sale so long as the amount due upon the debt must be determined and the property to be sold ascertained and defined. *Railroad Company* v. *Swasey*, 405.
8. Nor of a part of a case only. The whole case must come if any. *Crosby* v. *Buchanan*, 420.

LACHES. See *Statute of Limitations*.

Where the transactions out of which a case now before the court arose, occurred sixty-five years ago—litigation about them having been going on all the while—and the particular one before the court was begun thirty-five years ago, the court declared it to be high time that the case was ended, and that the court was not inclined to add to its length of years by looking after matters of mere form (objections of which were apparently now first made), in order to avoid substance. *Crosby* v. *Buchanan*, 420.

LIENS. See *Bankrupt Act*, 1, 2; *Evidence*, 3; *Vendor's Lien*.

LIFE INSURANCE.

Where A. by memorandum made an application to a life insurance company, in a distant city, to insure his life, and the company, as the case

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LIFE INSURANCE (*continued*).

which was found by the court, showed, "accepted" the application, but sent him a policy which "did not in terms agree with the memorandum, as to the date and time of payment"—*held*, that the acceptance was a qualified acceptance, and that A. having died before there was evidence that he actually received and assented to the change in the policy, the company was not bound. *Insurance Company* v. *Young's Administrator*, 85.

LIGHTS ON VESSELS. See *Anchor-watch*.

LIQUIDATED DAMAGES.

A contract provided that A. should deliver monthly to B., at a price named, a certain number of tons of coal, with a proviso that if A. did not so deliver the coal, he should pay to B. twenty-five cents for each ton not delivered, "OR," continued the contract, "instead thereof B. may elect to receive all or any part of the coal so in default in the next succeeding month." Coal rose suddenly in value. A. did not deliver any in the first month that he was bound to, and B. elected to take it in the next; but A. delivered none in either month. *Held*, that B. was entitled to actual damages, and could not be made to take the twenty-five cents per ton. *Grand Tower Company* v. *Phillips et al.*, 471.

"LOOKOUT." See *Anchor-watch; Collision*, 8.

At sea The absence of not important in a question of collision, when it is plain that the presence of one would not have averted the catastrophe. *The Dexter*, 69.

MANDAMUS.

Not writ of error, the proper remedy when a Circuit Court, bound to entertain from a State court and hear a case originally brought in the latter court, remands and refuses to hear it. *Railroad Company* v. *Wiswall*, 507.

MANUFACTURER'S TAX. See *Internal Revenue*, 2.

MONUMENTS. See *Alluvion; Boundary*.

MOTION TO DISMISS. See *Practice*, 2, 3, 4.

NATIONAL BANKS.

1. Under the act of Congress of February 10th, 1868, and the act of the legislature of Pennsylvania of March 31st, 1870, shares in National banks may be valued for taxation for county, school, municipal, and local purposes, at an amount above their par value. *Hepburn* v. *The School Directors*, 481.
2. This is true of shares in a National bank in Cumberland County, Pennsylvania. *Ib.*
3. Under the Internal Revenue Act of July, 1870, interest paid and dividends declared during the last five months of the year 1870, are taxable, as well as those declared during the year 1871. *Blake* v. *National Banks*, 307.

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OFFICER OF THE ARMY. See *Army Officer*.

"OMNIA PRÆSUMUNTUR RITE ESSE ACTA."

1. Where, under a contract entered into between the government and a transporter of military stores, in the wilds of the West, it was provided that a board of survey, composed of military officers, should on the arrival of the stores at their place of delivery, examine the quantity and condition of the stores transported, and "in cases of loss, deficiency, or damage, *investigate the facts and report the apparent causes, assess the amount of loss and injury, and state whether it was attributable to neglect or want of care on the part of the contractor or to causes beyond his control*," "a copy of which," said the contract, "shall be furnished to the contractor, shall be attached to the bill of lading, and shall conclude the payments to be made:" *Held*, that a report that did not report investigation of facts and the apparent causes, nor state whether the loss was attributable to neglect or the want of care on the part of the contractor or to causes beyond his control, but which merely on its face found the deficiency and charged it accordingly, would be supported; the contractor not having, at the time when it was made, objected either as to the form or the substance of the report; and objecting only when he came and got his money; when witnesses were scattered and gone, and most of them difficult if not impossible to be found; and then notifying to the quartermaster nothing more definite than that he, the contractor, would claim a readjustment and full damages. *United States* v. *Shrewsbury*, 508.
2. Where in a pending suit a patentee and a party charged with infringing agree to refer the question of infringement to a third person as arbitrator, and to be bound by his award, this court will presume, until the contrary is shown, that an award made is correctly made; and must so presume if, disregarding the award, the complainant goes on with his suit, and the case on coming here comes with a record that exhibits neither the patent of the complainant nor any description of the machine which was alleged to infringe it. *Reedy* v. *Scott*, 352.

OWNER. See *Factor*.

PAROL EVIDENCE. See *Evidence*, 8.

PARTIES.

If the purchaser from a vendee of lands sold to such vendee subject to the vendor's lien, and not conveyed by deed, be dead, leaving a widow his executrix, and heirs-at-law to whom with her his real estate has descended, they ought to be made parties defendant to any bill by the original vendor to foreclose the right to pay and claim a deed. *Lewis* v. *Hawkins*, 119.

PARTNERSHIP.

The right of a partner to sign the firm name to a contract of indemnity in favor of third persons must be strictly proved; but it need not necessarily be proved by a written authority to him. *Moran et al.* v. *Prather*, 492.

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PATENTS. See *Omnia præsumuntur rite esse acta*, 2; *Pleading*.

I. General Principles relating to.

1. An invention described in an application for a patent filed in the Patent Office is not of itself a bar to a subsequent patent therefor to another. Such an application may have a bearing on the question of the defence of prior invention or discovery, but will not of *itself* take such prior invention or discovery out of the category of unsuccessful experiments. *Corn-Planter Patent*, 181.
2. Certain reissues of an original patent held to be good as being for things contained within the machines and apparatus described in the original patents, although not claimed therein. Any question of fraud in obtaining these reissues is to be regarded as settled by the act of the Commissioner of Patents in granting them. *Ib.*
3. The use of the words "substantially as and for the purposes set forth," in a claim, throws it back to the specification, for qualification of words otherwise general. *Ib.*
4. A defendant held to have infringed a claim, in a complainant's patent, where parts of the machine patented were combined by a hinged joint, although in the defendant's machine the hinge was located at a different part of the machine; *the office, purpose, operation, and effect being the same.* A change a little more or less backward or forward held not to change the substantial identity. *Ib.*
5. A patentee, by his claim as to what he regards as new, disclaims by necessary implication the rest as old, and such remaining parts are to be regarded as old or common and public. *Ib.*
6. Where a claim, if construed in one way, would probably be held void as claiming a mere result irrespective of the means by which it was accomplished, will, if construed as claiming the accomplishment of the result by substantially *the means described* in the specification, become free from that objection, such claim should be construed in this limited manner, if possible, in order to save the patent. *Ib.*
7. Where the defendant (who was alleged to infringe Graham's patent of October 16th, 1860, "for picker-staff motion in looms"), employed a combination of a rocker with a bed by loose journals projecting on each side the picker-staff, and the combination was effected by means of a journal-bearing arm, it was *held* to be unimportant that the form of his journal-bearing arm was unlike that of the complainant's, or that its mode of attachment was different, so long as it performed the same function in substantially the same way. *Mason* v. *Graham*, 261.
8. Where the defendant had been in the habit of selling the infringing picker-staff motion both separately and in a form where they were attached to looms: *held*, that regard should be had, in ascertaining his profits upon those sold with the looms, to his profits upon those sold separately, rather than to the aggregate profits made by him upon the loom and attachment combined. *Ib.*
9. If a defendant has cheapened the cost of producing the infringing device by an improvement of his own, he is entitled to a corresponding

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PATENTS (*continued*).
credit in the ascertainment of the profits, which a complainant is entitled to recover. *Mason* v. *Graham*, 261.
10. A manufacture or a product of a process may be no novelty, and, therefore, unpatentable; while the process or agency by which it is produced may be both new and useful. *The Wood-Paper Patent*, 568.
11. In cases of chemical inventions, when the manufacture claimed as novel is not a new composition of matter, but an extract obtained by the decomposition or disintegration of material substances, it is of no importance, in considering its patentability, to inquire from what it has been extracted. *Ib.*
12. When the substance of two articles produced by different processes is the same, and their uses are the same, they cannot be considered different manufactures. *Ib.*
13. Paper-pulp extracted from wood by chemical agencies alone is not a different manufacture from paper-pulp obtained from vegetable substances by chemical and mechanical processes. *Ib.*
14. The purpose of a reissue being to render effectual the actual invention for which the original patent should have been granted, and not to introduce new features, parol testimony is not admissible, in an application for reissue, to enlarge the scope of the invention beyond what was described, suggested, or substantially indicated in the original specification, drawings, or Patent Office model. *Collar Company* v. *Van Dusen*, 580.
15. Whether a reissued patent is for the same invention as the original, depends upon whether the specification and drawings of the reissued patent are substantially the same as those of the original; and, if not, whether the omissions or additions are or are not greater than the law allows to cure the defect of the original. *Ib.*
16. Where an original patent for improvement in paper shirt-collars stated the invention to consist, first, in making the collars of parchment-paper, or paper prepared with animal sizing; and second, in coating one or both sides of the collar with a thin varnish of bleached shellac, to give smoothness, strength, and stiffness, and to repel moisture; the claim being for "a shirt-collar made of parchment-paper, and coated with varnish of bleached shellac, substantially as described, and for the objects specified:" *Held*, that a reissue thereof which describes a paper other than parchment-paper, or one prepared with animal sizing, and which does not require either side of the collars to be coated with a varnish of bleached shellac for any purpose, the claim being for "a collar made of long-fibre paper, substantially such as is above described," is for a different invention from that embodied in the original patent. *Ib.*
17. Articles of manufacture may be new in the commercial sense when they are not new in the sense of the patent law. *Ib.*
18. New articles of commerce are not patentable as new manufactures unless it appears in the given case that the production of the new article involved the exercise of invention or discovery beyond what was necessary to construct the apparatus for its manufacture. *Ib.*

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PATENTS (*continued*).

19. It appearing that the collars made by one Evans, apart from the paper composing them, were identical in form, structure, and arrangement with collars previously made of linen paper of different quality, and of other fabrics, and that Evans did not invent the special paper used by him, nor the process by which it was obtained: *Held*, that he was not entitled to a patent for the collars as a new manufacture. *Collar Company* v. *Van Dusen*, 580.
20. The relations of an employer and a party employed by him, in regard to the origin of invention, stated. *Ib.*
21. The object in turning down a collar on a curved line instead of a straight line is precisely the same, whether the collar be all paper, paper and linen, or all linen. Hence, where it appeared that linen collars had been turned over on a curved line, to prevent wrinkling, and to afford space for the cravat: *Held*, that it was not patentable to apply the same mode of turning down to collars of paper or paper and linen. *Ib.*
22. The defendants, vendors of organs generally, and selling sometimes organs having a patented invention consisting of a combination of what was called a "tremolo attachment," with the organ, and selling sometimes organs without the attachment, were decreed guilty in their sales of organs with the attachment of infringing the complainant's patent: *Held*, that in the ascertainment of profits made by them from sales of the organs with the tremolo attachment, it was proper to let them prove the general expenses of their business in effecting sales of organs generally, and deduct a ratable proportion from the profits made by the tremolo attachment. *The Tremolo Patent*, 518.
23. The principles on which general expenses should be ascertained. *Ib.*

II. PARTICULAR PATENTS, VALIDITY OF.

24. Certain reissues of patents to G. W. Brown for improvements in corn-planting machines declared void and certain others valid. *The Corn-Planter Patent*, 181.
25. The patent to E. H. Graham, of May 28th, 1867 (original October 16th, 1860), for "an improvement in picker-staff motion for looms," declared valid. *Mason* v. *Graham*, 261.
26. A reissued patent to Ladd & Keen, April 7th, 1868 (original July 18th, 1854, to Watt & Burgess), for a pulp suitable for the manufacture of paper made from wood or other vegetable substances, declared void. *Wood-paper Patent*, 568.
27. Reissued patent to Ladd & Keen, dated April 7th, 1868 (original July 18th, 1854, to Watt & Burgess), for "improvements in pulping and disintegrating wood," declared void. *Ib.*
28. Reissued patents to Andrew Evans, for "improvement in paper shirt-collars," July 10th, 1866 (original May 26th, 1863) declared void. *Collar Company* v. *Van Dusen*, 580.
29. Reissued patent to Solomon Gray, "for improvement in turnover shirt-collars," March 29th, 1864 (original June 23d, 1863), declared void. *Ib.*

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PATENTS (*continued*).

III. PARTICULAR PATENTS, CONSTRUCTION OF.

30. The reissued patent to E. H. Graham, May 28th, 1867 (original October 16th, 1860), "for picker-staff motion in looms," embraces every combination of a rocker with a bed and loose journal-bearing arms, arranged so as to produce the result described in the specification as effected by the combination. *Mason* v. *Graham*, 261.

31. The two boiler patents granted to Morris L. Keen, the one dated September 18th, 1850, and the other June 16th, 1863, held to be for combinations. *The Wood-paper Patent*, 568.

32. The patent granted May 26th, 1857, to Marie Amedée Mellier, covers the process claimed, when applied to wood as well as when applied to straw. *Ib.*

33. The "*internal pressure*," as described in the specification, is to be ascertained by deducting from the pressure marked by the steam-gauge, the weight of one atmosphere. *Ib.*

PILOT.

1. Bound, when there is a possibility of collision, not to be governed by "impressions" of what the neighboring vessel intends to do, but bound to make and exchange signals. *The Great Republic*, 20.

2. If not strictly temperate in the use of strong drinks, when on shore, liable to have unfavorable constructions put on his acts, if accident happens to his vessel soon after leaving port, in charge of the wheel. *Ib.*

PLEADING. See *Practice*, 18.

1. Though as a general rule suits for infringement of a patent are defeated by the surrender of the patent, and a new original bill—not a supplemental bill—is the proper sort of bill by which to proceed for an infringement under the reissue, yet where there has been a surrender and reissue, and the patentee has proceeded by a supplemental bill—the defendant making no objection to this sort of proceeding, but allowing proofs to be taken and the suit to proceed otherwise to a conclusion, as if the irregularity were wholly unimportant; the two parties proceeding respectively throughout the trial upon the assumption and concession that the reissued patent was substantially for the same invention as that embodied in the original patent—all objection to the irregularity in proceeding by a supplemental bill instead of by a new original one must be considered as waived. *Reedy* v. *Scott*, 352.

2. Where, pending a bill in a Federal court for the infringement of a patent, the parties have agreed to submit the question whether a machine made by the defendant was an infringement, to a solicitor of patents, and to abide by his decision, and that if he decides that it is not, then that the bill in said suit shall stand dismissed; and the referee does decide that there is no infringement, but the complainant instead of having his original bill dismissed and filing a new original bill, files a supplemental bill alleging a surrender and reissue, and that the reissue is "for the same invention" as was secured by the

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PLEADING (*continued*).

original patent: in such case if it appear that the parties throughout the trial have treated the invention secured by the reissue, as substantially the same invention as that secured by the original letters, and have raised no issue about exact specification or any of those differences which may properly exist between a claim in an original patent and a claim in a reissue, but on the contrary have impliedly admitted substantial identity, having taken the issue on other matters, the matters, to wit, whether the complainant was not deceived when agreeing to refer, and whether the right of the referee to make any award was not legally revoked before any award was made by him, and whether, therefore, the award was not void: in such case if the court be satisfied that there was no deception, and that the award was made, and validly, then the plea of the award and agreement to be bound by it, may be properly pleaded to the supplemental bill as it might have been to the original one. *Reedy* v. *Scott*, 852.

PRACTICE. See *Costs; Decrees in Foreclosure; Jurisdiction; Parties.*

(*a*) *In cases generally.*

1. A rehearing will not be granted on the ground that the record on which the case was heard was imperfect, it appearing by an examination of the parts which on the original hearing were left out, but which were now brought up, that they presented nothing but matter which did not affect the merits of the case, or matter which only further established that which the court in giving its decree considered to be already otherwise abundantly proved. *Ambler* v. *Whipple*, 278.
2. The court will not, generally speaking, refuse to hear a motion to dismiss, before the term to which, in regular order, the record ought to be returned, if the record be printed and the rules of court about motions of that sort have been complied with by the party making the motion. *Thomas & Co.* v. *Wooldridge*, 283.
3. Though a failure of the party making a motion to dismiss, to send a copy of his brief to the counsel of the other side within the time required by the amendment made at December Term, 1871, to Rule 6, would entitle such counsel of the other side to ask to postpone the hearing in order to give time for further preparation, yet if he have himself before the hearing filed a full argument upon the merits of the motion, the failure of his opposing counsel to have complied with the amendment to the rule would hardly warrant an objection that the notice of the motion was insufficient. *Ib.*
4. A motion to dismiss an appeal in equity may properly be made by one of several appellees, he being the only one who has any interest in the suit, and the only one who filed an answer below. *Ib.*
5. Where, by the laws of a State, an appeal can be taken from an inferior court of the State to the highest court of the same, only with leave of this latter or of a judge thereof, and that leave has been refused in any particular case, in the regular order of proceeding—the refusal not being the subject of appeal to this court—a writ of error, if there be in the case a "Federal question," properly lies, under

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PRACTICE (*continued*).

section 709 of the Revised Statutes, to the inferior court, and not to the highest one. *Gregory* v. *McVeigh*, 294.

6. Cases cannot be brought up to this court in parts. The whole case must come, if any part of it come. *Crosby* v. *Buchanan*, 420.

7 *Quære.* Whether a general assignment of errors that the judgment below on a special case was for the wrong party, is sufficient. *Scholey* v. *Rew*, 331.

8. *Semble.* That an objection that a devise is void because of the alienage of the devisee, cannot first be taken by him in this court on a writ of error to the judgment of a Circuit Court on a special case, although the record discloses the fact of alienage. *Ib.*

9. The order of a Circuit Court remanding, for want of jurisdiction to hear it, a case removed from a State court into it, is not a "final judgment" in that sense which authorizes a writ of error. *Railroad Company* v. *Wiswall*, 507.

10. Nor is a decree of foreclosure and sale, in the sense which allows an appeal from it, so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined. *Railroad Company* v. *Swasey*, 405.

11. Where on certain facts found by the Court of Claims—it refusing to find as a fact a certain allegation which the petitioner in the suit requested it so to find—that court has given judgment against the petitioner, and the petitioner has taken the record to this court, which, upon considering the case found, reverses the judgment of the Court of Claims and remands the cause "for further proceedings in conformity with law and justice," there is nothing which prevents the Court of Claims from setting aside the findings of fact which it had made on the first trial and from trying the case *de novo*. *Ex parte Medway*, 504.

12. In administering justice under a new, complicated, and sometimes not very well expressed statute (as *ex. gr.*, the Bankrupt Act), which gave a party an appeal from the District Court to the Circuit Court in one class of cases, provided he proceeded in one special way, and an appeal in another class, if he proceeded in another special way, but confined each of the two classes of cases to its own special mode of proceeding, this court—in a suit where the case which was capable of being taken properly into the Circuit Court in one form was taken in fact and improperly there by the other—while it held that no appeal lay to *it* to hear and determine merits, and that it could only reverse the judgment and remand the case to the Circuit Court, with directions to dismiss the petition—the effect of which would be, owing to the loss of time, to leave the appellant without the ability to get his case into the Circuit Court, in the right way—this court thought it fitting to suggest that perhaps, on a proper application, the District Court would grant a review of the decree that *it* had rendered, which review, if granted, would lay the foundation, in case of an adverse decision, as before, upon the merits, for ar appeal in proper form to the Circuit Court. *Stickney* v. *Wilt*, 150.

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PRACTICE (*continued*).

(*b*) *In chancery.* (See *supra*, 4.)

13. An amendment which changed the character of a bill allowed even after final decree, the circumstances being peculiar and the cause having been in fact tried exactly as it would have been if the bill had originally been in the amended form. *The Tremolo Patent*, 518.

14. When a bill in equity, making colorable allegations of equitable grounds of jurisdiction, seeks to recover land which the complainants is out of possession of, but shows plainly, on the proofs being heard, a case where, if the complainant has a remedy, it is by ejectment, the court *sua sponte* and without demurrer, plea, or answer setting up the impropriety of asking equitable aid, should recognize the fact and give effect to it. *Lewis* v. *Cocks*, 466.

PRESUMPTION. See *Omnia præsumuntur rite esse acta.*

PRINCIPAL AND AGENT. See *Towing Tug.*

The owners of a vessel in flames towed by a tug and no longer in command of her own captain and crew, are not liable for injury done by her to another vessel, by the negligence of the captain of the tug; the said owners not having employed the tug, she being a tug whose regular business was the assistance of vessels in distress, and she having gone, of her own motion, to the extinguishment of the fire in this case. *The Clarita*, 1.

PROCEEDING IN REM. See *Res Judicata.*

In a proceeding *in rem*, a valid seizure and actual control of the *res* by the marshal gives jurisdiction, and an improper removal of it from his custody, as by an order of court improvidently made, does not destroy the jurisdiction. *The Rio Grande*, 458.

RECEIPT. See *Omnia præsumuntur rite esse acta.*

REHEARING.

Will not be granted on the ground that the record on which the case was heard was imperfect, if it appear by an examination of the parts which, on the original hearing, were left out, but which were now brought up, that they present nothing but matter which does not affect the merits of the case, or matter which only further establishes that which the court in giving its decree considered to be already otherwise abundantly proved. *Ambler* v. *Whipple*, 278.

REMAINDER. See *Shelly's Case, Rule in.*

RES JUDICATA. See *Eminent Domain; Judicial Comity.*

Where, on a libel *in rem* in the admiralty for repairs, a vessel had been seized, and, on hearing, the libel was dismissed, but on the same day an appeal to the Circuit Court was moved and allowed, a motion made on the next day by the claimants and improvidently granted, to restore the vessel to them, does not divest the Circuit Court of its jurisdiction to hear the appeal, and in such a case a decree by the Circuit Court that the vessel was a foreign vessel—an issue whether it was so or not having been raised in the pleadings—if pleaded or put

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RES JUDICATA (*continued*).
in evidence in the District and Circuit Courts of another circuit, to which the case finally gets on a new libel *in rem* by the original libellants against the vessel, which on a subtraction of it from the first district and circuit they have pursued into a new district and circuit, and seized anew, is conclusive of the foreign character of the vessel *The Rio Grande*, 458.

REVERSAL AND REMAND. See *Practice*, 11.

REVISED STATUTES OF THE UNITED STATES.
The following sections referred to, commented on, and explained.
Section 709. See *Jurisdiction; Practice*, 5.
" 4916. See *Patents*, 14–16; 27.

RIPARIAN RIGHTS. See *Alluvion; Boundary*.

SALVAGE.
The owners of a vessel who through their own carelessness (or that of their captain) set fire to another vessel, cannot claim salvage for putting that fire out. *The Clara*, 1.

SHELLY'S CASE, RULE IN.
Does not apply to a case where a husband and wife conveyed lands in trust for the sole and separate use of the wife and for the children of the two parties, during the wife's life in absolute property, as if she were a *feme sole*, and free and clear of "any right, title, and estate, whether as tenants by the curtesy or otherwise of her present or any future husband, and from his control from any liability for his debts, and upon trust and to hold and dispose of and convey the said premises in such manner and to such uses, interest, and purposes as his wife may from time to time direct by any last will and testament, or other testamentary writing of what form soever, which she, the wife, notwithstanding her present or any future coverture, shall and may direct, limit, and appoint; and in the absence of any such direction, limitation, or appointment, or subject thereto, or remainder after her death, to her heirs-at-law of the wife." *Green* v. *Green*, 486.

SHIPMASTER.
If given to drinking spirituous liquors, even while on shore, liable to have unfavorable construction put on his management of a ship where an accident, which may have happened through his fault, has happened soon after his vessel has left port. *The Great Republic*, 20.

"SILK TIES."
Are chargeable under the Tariff Act of July 30th, 1864, with a duty of 50 per cent. *ad valorem*. *Smythe* v. *Fiske*, 374.

STATUTE OF LIMITATIONS.
Barring suits for the recovery of real estate after a certain lapse of time, does not apply to the case of a suit brought by a vendor of land having a vendor's lien, and who has never made a deed but only agreed to make one, against a purchaser from the original vendee. Both the original vendee and the purchaser from him, stand in the relation of a trus-

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STATUTE OF LIMITATIONS (*continued*).
tee to the vendor for the unpaid purchase-money (or, as the matter is looked upon in some States, stand in that of a mortgagee), against whom the statute does not run. *Lewis* v. *Hawkins*, 120.

STATUTES See *Construction, Rules of*, I.

STATUTES OF THE UNITED STATES.
The following, among others, referred to, commented on, and explained.

1789.	September 24th.	See *Jurisdiction; Proceeding in rem.*
1803.	March 3d.	See *Jurisdiction.*
1822.	May 7th.	See *Surveyors of Ports.*
1831.	March 2d.	See *Surveyors of Ports.*
1836.	July 4th.	See *Patents.*
1841.	March 3d.	See *Surveyors of Ports.*
1842.	August 3d.	See *Customs of the United States.*
1846.	May 22d.	See *Customs of the United States.*
1846.	July 30th.	See *Customs of the United States.*
1857.	March 3d.	See *Surveyors of Ports.*
1861.	May 2d.	See *Customs of the United States.*
1863.	March 3d.	See *Army Officer.*
1863.	March 12th.	See *Abandoned and Captured Property Act.*
1864.	April 29th.	See *Collision*, 8, 10.
1864.	June 30th.	See *Internal Revenue; National Banks*, 1.
1864.	July 30th.	See "*Silk Ties.*"
1866.	July 13th.	See *Internal Revenue.*
1866.	July 27th.	See *Jurisdiction*, 2.
1866.	July 30th.	See *Customs of the United States.*
1867.	March 2d.	See *Bankrupt Act.*
1868.	February 10th.	See *National Banks*, 1, 2.
1870.	July 8th.	See *Patent.*
1870.	July 14th.	See *National Banks.*
1872.	June 8th.	See *Surveyor of Ports.*
1878.	March 3d.	See *Customs of the United States.*

STEAMBOAT DEBTS. See *Evidence*, 8.

STEAMERS AND SAILING VESSELS.
Their respective obligations when there is a possibility of collision at sea. *The Sea-Gull*, 165.

SUCCESSION TAX. See *Internal Revenue*, 4.

SURVEYORS OF PORTS.
Performing the duties of collectors of the customs in ports other than those ports enumerated in the fifth section of the act of May 7th, 1822 (3 Stat. at Large, 693), that is to say of ports other than Boston, New York, Philadelphia, Baltimore, Charleston, Savannah, and New Orleans, are entitled to a salary of but $5000 a year, even though the ports in which such surveyors may be performing the duties of collectors had no existence on May 7th, 1822, and, like the port of St. Louis, were not created till 1831. The system of classes, established

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SURVEYORS OF PORTS (*continued*).
for salary purposes by the above-mentioned act of 1822, extends to surveyors doing collectors' duty in ports subsequently created. *Donovan* v. *United States*, 388.

TARIFF. See *Customs of the United States.*

TENDER OF DEED. See *Costs.*

TOWING-TUG. See *Anchor-ground; Principal and Agent.*
A vessel whose business it is to give relief to vessels on fire is bound to have chain hawsers or chain attachments on board, and if having only manilla hawsers she is compelled to tow a vessel out of its dock with such a hawser, which is burnt, so that the vessel on fire gets loose from the tug, and, drifting, sets fire to another vessel, the tug is liable for the damages caused. *The Clarita*, 1.

VENDOR'S LIEN.
1. Where a party agrees to sell land to another and as consideration therefor the vendee gives his promissory notes payable at a future date named, and the vendor gives his bond conditioned that on the payment of the notes he will convey the premises in fee to the vendee, but makes no deed, the legal estate remains, until the payment of the purchase-money, in the vendor, and he has, by the law of those States where such liens are recognized, a "vendor's lien." The vendee has an equitable title only; one indeed which he can sell or devise, but one which if the purchase-money is unpaid he cannot sell so as to exclude the vendor's right to have payment of it. Any purchaser from the vendee who assumes to pay the notes takes the same title that the vendee had, that is to say an equitable title, the land being still charged with the payment of the purchase-money. *Lewis* v. *Hawkins et al.*, 119.
2 If the notes are not paid, the vendor may apply by bill in equity against the vendee and the purchaser from him, tendering a good deed, and ask that they pay the purchase-money at short date or be foreclosed from setting up any right to the land, and that it be sold and the proceeds applied to paying the purchase-money. *Ib.*

VESSELS ON FIRE.
The obligation of tugs undertaking to tow them stated, as also the law in other particulars relating to the general subject. *The Clara and The Clarita*, 1.

WAIVER. See *Omnia præsumuntur rite esse acta; Pleading; Practice*, 18.

WATCH AT SEA. See *Anchor-watch; Lookout.*

WHOLESALE DEALERS. See *Internal Revenue*, 1.

WRIT OF ERROR. See *Practice*, 5.

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